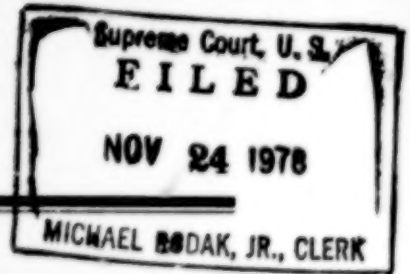


APPENDIX



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COM-
PANY, and TUCSON GAS & ELECTRIC COMPANY,
Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the
Taxation and Revenue Department, REVENUE DIVISION OF
THE TAXATION AND REVENUE DEPARTMENT, and STATE OF
NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

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Docket Entries (New Mexico Supreme Court)

SUPREME COURT OF NEW MEXICO

DOCKET No. 11369

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,

Plaintiffs-Appellants,

vs.

FRED O'CHESKY, Commissioner of Revenue, BUREAU OF REVENUE AND STATE OF NEW MEXICO,

Defendants-Appellees.

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CIVIL APPEAL FROM DISTRICT COURT SANTA FE (50245)
COUNTY

Judgment 2/18/77

Notice of Appeal 3/18/77

Edwin L. Felter, Judge

CASH ACCOUNT FOR COSTS

DATE	RECEIVED FROM	OF PAID TO	RECEIVED	DISBURSED
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1977

April 11	Bigbee Stephenson Carpenter & Crout		\$20.00	
	State Treasurer			\$16.00

Sept. 12 Record Bound

CITATIONS—Amicus Curiae

_____ N. MEX. _____ 576 PAC. 2ND 291

DATE	PROCEEDINGS
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1977

April	11	Skeleton Transcript
June	30	3 Transcript of Record (5 volumes) Request for Oral Argument
July	29	Brief in Chief
August	24	Motion to extend Answer Brief to September 26—app'd
September	26	Answer Brief
October	5	Motion to extend Reply Brief to October 17—app'd

17 Reply Brief
Certificate of Service

November 9 Argued and Submitted

1978

March 23 Opinion (Payne/Sosa-Easley)
Order affirming

April 4 Mandate
10 Receipt for Mandate
12 Notice of Appeal to United States
Supreme Court
Affidavit of Service

June 13 Request for Certification and
Transmission
Affidavit of Mailing (attached to request)
15 Certification and Transmission of Record

Docket Entries (Santa Fe District Court)

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, ET AL,
Plaintiffs

vs.

FRED O'CHESKEY, *Defendants.*

TYPE OF CASE—Declaratory Judgment FEE \$20.00

DATE	DIV. II	PROCEEDINGS	MISCELLANEOUS ACCOUNTS	REMARKS
------	---------	-------------	------------------------	---------

1975

Sept. 18		Docket Fee		
		18—Complaint, filed		
		18—Summons, issued		
		19—Summons, returned & filed		
Oct. 10		Motion for extension of time to move or plead, filed		
		10—Entry of Appearance, filed		
		20—Order, filed & entered		
Nov. 10		Memorandum of Points and Authorities In Support of Motion To Intervene, filed		
		10—Motion For Leave To Intervene, filed		
		10—Answer In Intervention, filed		
		10—Motion To Dismiss, filed		
		13—Supplemental Memorandum In Support of Motion to Intervene, filed		

21—Plaintiff's Brief in Opposition to Motion for Intervention, filed

25—Stipulation, filed

25—Order, filed and entered

Dec. 18—Defendants' Memorandum Opposing Intervention, filed

22—Plaintiffs Brief in Opposition to Defendants' Motion to Dismiss, filed

1976

Jan. 12—Petition for Leave For Defendants To File A Reply to Plaintiff's Brief In Opposition, filed

12—Order, filed and entered

12—Defendants' Reply to Plaintiff's Brief In Opposition To the Motion to Dismiss, filed

19—Notice of Hearing, filed

1976 50245 Arizona vs Fred O'Cheskey

Feb. 13—Entry of Appearance, filed

23—Supplemental Brief In Support of Defendants

12(b)(6) Motion to Dismiss, filed

May 26—Order, filed and entered

June 4—Supplemental Order, filed & entered

4—Application for Order Allowing Interlocutory Appeal, filed

July 21—Joint Answer, filed

Aug. 16—Notice of Hearing, filed

25—Interrogatories, filed

Sept. 3—Objection to Interrogatories & Notice of Hearing, filed

14—Answers to Defendant Bureau of Revenue's Interrogatories, filed

- 15—Brief In Support of Plaintiffs' Motion For Summary Judgment, filed
- 15—Plaintiff's Motion For Summary Judgment, filed
- 20—Notice of Hearing, filed
- 21—Notice of Hearing, filed
- 23—Order, filed & entered

Oct. 6—Supplemental Interrogatories, filed

1976 50245 Arizona vs O'Cheskey et al

Oct. 12—Notice of hearing, filed

- 21—Plaintiffs' Supplemental Answers to Interrogatories, filed
- 22—Answer to Defendants Supplemental Interrogatories, filed
- 22—Order, filed and entered
- 22—First Amended Complaint, filed
- 25—Motion to Compel Answers to Interrogatories, filed
- 27—Restated Interrogatory 8, filed
- 29—Withdrawal as Counsel & Consent to Substitution of Counsel, filed

Nov. 2—Order filed & entered

- 4—Notice of hearing, filed
- 5—Plaintiffs Supplemental Motion for Summary Judgment, filed
- 5—Brief in Support of Plaintiffs Supplemental Motion for Summary Judgment, filed
- 8—Answer to the first amended complaint, filed
- 9—Plaintiffs Answer to Restated Interrogatory 8, filed

1976 No. 50245—Arizona Public Service vs O'Cheskey

Dec. 2—Objection to Plaintiff's Affidavits No. 6 & No. 7, filed

- 2—Memorandum in Support of Defendants' Objection to Affidavits 6 & 7, filed
- 2—Defendants' Motion for Summary Judgment, filed
- 7—Notice of Hearing, filed
- 16—Memo in Opposition to Defendant Objections to Plaintiff's Affidavits 6 & 7 to Plaintiff's Motion for Summary Judgment, filed
- 20—Certificate of Service, filed
- 21—Brief In Support of Defendants' Motion for Summary Judgment, filed

1977

Jan. 1—Notice of Hearing, filed

- 20—Plaintiffs Response To Defendants Brief In Support of Defendants' Motion For Summary Judgment, filed

Jan. 31—Memorandum Opinion filed & entered

Bf. 313P. 404-414

Feb. 18—Judgment, filed & entered

Bf. 315P. 250-251

Mar. 18—Notice of Appeal, filed (vnm)

- 23—Clerk's Certificate, issued & filed
- 23—Request For Transcript of Record Proper, filed
- 30—Appellees' Designation of Additional Parts of the Record, filed

May 27—Certificate of Satisfactory Arrangements For Transcript, filed (vnm)

- 27—Motion For Extension of Time To File Transcript On Appeal, filed (vmm)
- 27—Order, filed and entered (vmm)

June 28—Transcript of Record, filed

Oct. 7—Affidavit of Daniel H. Friedman, filed

- 7—Exhibit to Affidavit of Daniel H. Friedman, filed
- 7—Motion to correct the record on appeal, filed

Oct. 14—Plaintiff's Response to Motion to Correct Record
on Appeal and Conditional Motion, filed

1978

April 7—Mandate (affirmed), filed & entered

[1]

Complaint

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

COMPLAINT

Plaintiffs bring this action for declaratory judgment pursuant to the New Mexico Declaratory Judgment Act, Chapter 340, Laws 1975, with respect to the constitutionality and validity of the Electrical Energy Tax Act, Chapter 263, Laws 1975, and for their complaint herein, state:

1. Arizona Public Service Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

2. El Paso Electric Company, a Texas corporation, generates, transmits, distributes and sells electrical energy within the States of New Mexico and Texas, and is regulated as a public utility in New Mexico by the New Mexico Public Service Commission and in Texas by the cities of El Paso, Van Horn, Anthony and Clint.

3. Salt River Project Agricultural Improvement and Power District (hereinafter "Salt River Project"), a political subdivision of the State of Arizona, operating a federal

reclamation project pursuant to contracts with the Secretary of the Interior, generates, transmits, distributes and sells electrical energy within the State of Arizona.

4. Southern California Edison Company, a California corporation, generates, transmits, distributes and sells electrical energy within the State of California, and is regulated as a public utility by the California Public Utilities Commission.

5. Tucson Gas & Electric Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

6. Fred O'Cheskey is Commissioner of the Bureau of Revenue of the State of New Mexico. The Bureau of Revenue is the agency of state government charged with the administration and enforcement of the Electrical Energy Tax Act.

7. The Four Corners Power Plant is an electrical generating station composed of five generating units and related facilities located on Indian lands leased from the Navajo Nation under Leases dated December 1, 1960 and July 1, 1966, duly approved by the Navajo Tribal Council and the Acting Secretary of the Interior.

8. Arizona Public Service Company owns and operates generating units Nos. 1, 2 and 3 at the Four Corners Power Plant. Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Southern California Edison Company and Tucson Gas & Electric Company each owns an undivided interest in generating units Nos. 4 and 5 at the Four Corners Power Plant.

9. The San Juan Generating Station is an electrical generating station composed of two generating units (one operational and one under construction) and related facili-

ties located in San Juan County, near Waterflow, New Mexico.

10. Public Service Company of New Mexico and Tucson Gas & Electric Company each owns an undivided one-half ($\frac{1}{2}$) interest in the San Juan Generating Station.

11. Certain of the plaintiffs (Arizona Public Service Company and El Paso Electric Company) sell electrical energy generated from the Four Corners Power Plant to a foreign country, Mexico.

12. As shown on the Map of Principal Transmission Lines annexed hereto as Exhibit "A", the electrical system of each plaintiff is directly interconnected with the system of each other plaintiff and with the electrical systems of Public Service Company of New Mexico, the U.S. Bureau of Reclamation, and Utah Power and Light Company. Southern California Edison Company's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnected transmission lines thus constitute an interstate grid encompassing the West.

13. As a consequence of the system interconnections described in the preceding paragraph, the demand for electricity in the major urban centers served by the plaintiffs in Arizona, southern California, and the El Paso area of West Texas determines in substantial degree the amount of electrical energy generated at generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand to which each plaintiff is entitled from its generation facilities is instantaneously transmitted over existing transmission lines to that plaintiff's service area.

14. All of the plaintiffs' above-described transactions in the generation and transmission of electrical energy at the Four Corners Power Plant and the San Juan Generating Station, and the distribution and sales of such electrical energy, are in the course of commerce among the States and the Navajo Tribe of Indians, except for the aforesaid sales of electrical energy to Mexico, certain relatively insignificant sales made by Arizona Public Service Company within New Mexico to Utah International Inc., for operation of the Navajo Mine which provides the fuel for the Four Corners Power Plant, and for certain sales by El Paso Electric Company within its service area in the State of New Mexico. All other sales or exchanges of electrical energy in New Mexico by any plaintiff are wholesale sales to other electric utility companies on the interconnected systems in interstate commerce under the exclusive jurisdiction of the Federal Power Commission. Such interstate sales give rise to no New Mexico gross receipts tax liability under the New Mexico Gross Receipts and Compensating Tax Act.

15. Each plaintiff pays income, ad valorem, franchise and other taxes imposed by the State of New Mexico or its political subdivisions on it and other taxpayers similarly situated, and income, ad valorem, sales and use (or their equivalent), franchise, excise and other taxes imposed by the state of its incorporation on it and other taxpayers similarly situated.

16. Section 3 of the Electrical Energy Tax Act, Chapter 263, Laws 1975 (hereinafter the "Act"), purports to impose on persons generating electricity a privilege tax of four-tenths of one mill "on each net kilowatt hour of electricity generated in New Mexico" for the purpose of sale.

17. Subsection 9B of the Act provides that the electrical energy tax paid on electricity generated and consumed in New Mexico may be credited against the gross receipts tax due New Mexico. No credits of any type are provided with

respect to the electrical energy tax imposed upon electricity generated in New Mexico but transmitted and consumed outside New Mexico.

18. Subsection 9C of the Act directs that the credit for electrical energy tax paid on electricity generated and consumed in New Mexico shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and further requires the assignee of such credit to reimburse the assignor for the amount of the credit so assigned.

19. The practical operation and effect of Sections 3 and 9 of the Act is to tax the generation of electricity in New Mexico but shift the incidence of such tax to those who sell or consume that electricity outside New Mexico since the person generating and selling electricity for consumption in New Mexico receives either a credit (under Subsection 9B) against his gross receipts tax due New Mexico or a reimbursement (under Subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

20. Plaintiffs' retail sales of electrical energy transmitted from generating facilities in New Mexico to plaintiffs' respective service areas in Texas, Arizona and California are subject to certain taxes imposed by those states, or the political subdivisions thereof, or both. Such taxes are variously denominated as sales or other types of excise taxes, but are uniformly imposed upon, or passed on to consumers of electricity in those states.

21. There is no provision of law in Texas, Arizona or California whereby any of the plaintiffs are entitled to any credit, offset or rebate for the electrical energy tax imposed on them by New Mexico.

22. Public Service Company of New Mexico, an electric public utility regulated by the New Mexico Public Service Commission, with respect to its share of electrical energy

generated at the Four Corners Power Plant and the San Juan Generating Station, will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act due to the provisions of Subsections 9B and 9C of the Act permitting the amount of electrical energy tax paid to be assigned or credited against its gross receipts tax liability due the State of New Mexico.

23. El Paso Electric Company will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act with respect to the electrical energy generated in New Mexico and sold by it to consumers in New Mexico due to the provisions of Subsections 9B and 9C of the Act allowing the electrical energy tax to be credited against its New Mexico gross receipts tax liability.

24. Plains Electric Generation and Transmission Cooperative, a New Mexico corporation, generates electrical energy at its generating plant near Algodones, New Mexico, and transmits and sells electrical energy solely to New Mexico electric utilities which are its members; however, by reason of Subsections 9B and 9C of the Act, it will incur no additional tax burden due to the Electrical Energy Tax Act.

25. Plaintiffs are informed and believe, and therefore allege, that no additional tax liability under the Electrical Energy Tax Act is incurred by any other person (as defined in the Electrical Energy Tax Act) engaged in the same business as plaintiffs upon electrical energy generated and consumed in New Mexico, due to the availability of the crediting provisions provided for under Subsections 9B and 9C of the Act.

26. Plaintiffs are informed and believe, and therefore allege, that all, or virtually all, of the additional taxes claimed to be due under the Electrical Energy Tax Act, after application of Subsections 9B and 9C of the Act, will be borne by those persons, including plaintiffs, engaged in

the generation of electricity in New Mexico which is transmitted across and consumed outside the boundaries of the State of New Mexico.

27. Plaintiffs are informed and believe, and therefore allege, that the Act was enacted for the purpose of and the view to placing the exclusive burden of paying additional tax revenues to the State of New Mexico upon transactions in commerce among the several states and with the Indian Tribes.

28. The language of the Act, coupled with the practical application of the tax, constitutes a tax on the privilege of engaging in commerce among the several states.

29. Plaintiffs contend that the Act is unconstitutional and void for each and every one of the following reasons:

A. The Electrical Energy Tax Act violates the Commerce Clause of Article I, Section 8 of the United States Constitution by deliberately and invidiously discriminating against and imposing direct and multiple burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity.

B. Application of the Electrical Energy Tax to these plaintiffs, measured by electricity generated in New Mexico for transmission and sale in interstate commerce, is arbitrary, capricious and unreasonable and denies to each plaintiff the equal protection of the law, and the rights, privileges and immunities enjoyed by other members of the class defined as persons generating electrical energy in New Mexico, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18, and Article IV, Section 26 of the New Mexico Constitution.

C. The Act deprives plaintiffs of property without due process of law in violation of Section 1 of the

Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

D. The Act violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constitution.

30. Plaintiffs are informed and believe, and therefore allege, that defendants contend the Act is constitutional with respect to the matters set forth in paragraph No. 29 of this Complaint.

31. The plaintiffs, being persons whose rights, status or other legal relations are affected by the Act, request that the Court determine the questions of validity arising under the Act.

32. A genuine controversy exists between the plaintiffs and defendants with respect to the matters hereinbefore alleged; however, there is no controversy respecting the amount of the tax which would be payable by any plaintiff, if the Act is valid, nor with respect to the form or accuracy of any assessment of tax thereunder.

33. Due to the necessity to construe and apply provisions of the United States Constitution and the New Mexico Constitution in order to resolve the controversy between plaintiffs and defendants, plaintiffs have no other plain, speedy and adequate remedy.

34. All conditions precedent to the commencement and maintenance of this action have occurred or been met.

WHEREFORE, plaintiffs pray:

A. That this Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be unconstitutional and void.

B. That upon final hearing and determination the defendants be enjoined from enforcing the Electrical

Energy Tax Act and plaintiffs have such other and further relief as may be proper in the premises.

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**Answers to Defendant Bureau of Revenue's
Interrogatories**

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

Interrogatory No. 1. Please give the citation for and popular name of the state tax statutes, other than New Mexico's, to which you are subject.

Answer to Interrogatory No. 1. See affidavits 1 through 5 attached to plaintiffs' Motion for Summary Judgment.

Interrogatory No. 2. Please identify all agreements, other than those referred to in the Stipulation of Facts proposed by your attorneys, currently in force between you and any other plaintiff or any other utility generating or selling electricity in New Mexico. If you will do so without a motion to produce, please attach a copy of each agreement to your answers.

Answer to Interrogatory No. 2.

Objected to.

Interrogatory No. 3. Please give the amounts of electricity generated outside New Mexico in 1975 which you sold to New Mexico utilities and identify the utilities.

Answer to Interrogatory No. 3.

ARIZONA PUBLIC SERVICE

<u>Sold To</u>	<u>Generated Outside New Mexico</u>	<u>Generated in New Mexico</u>	<u>Total Sale</u>
PSNM	1,585 Mwh	200 Mwh	1,785 Mwh
EPE Co.	3,075 Mwh	370 Mwh	3,445 Mwh

EL PASO ELECTRIC

Normally, all Kwh sold to other utilities in New Mexico are generated in New Mexico. However, available records for the last six months of 1975 indicate 180,000 Kwh generated in Texas were sold to PSNM. This should be regarded as an extraordinary transaction.

SALT RIVER PROJECT

None.

SOUTHERN CALIFORNIA EDISON

None.

TUCSON GAS & ELECTRIC

TG&E sold 30,000 Kwh to PSNM in 1975 from electricity generated outside New Mexico.

Interrogatory No. 4. Please list the amount of electricity generated in New Mexico purchased by you in each year since 1959.

Answer to Interrogatory No. 4.

Objected to. However, plaintiffs, without waiving their objections, will give the answer for the years 1970 through 1975 as the requested information is available.

ARIZONA PUBLIC SERVICE

Information is not available to make a direct answer to this question exactly as it is stated. Therefore, individual purchases by APS along with brief explanations are listed as follows:

A: Energy generated at San Juan, purchased from TGE

1973— 50,836 Mwh all generated in N.M.

1974—190,195 Mwh all generated in N.M.

B: Energy generated at Four Corners, purchased from SCE

1974— 8,186 Mwh all generated in N.M.

C: Economy Interchange purchased from PSNM

Total amounts purchased by APS are listed below. Most of this, but not all, was generated in New Mexico. A portion was bought from USBR by PSNM and re-sold to APS.

Year	1970	1971	1972	1973	1974	1975
	17,120	31,507	19,600	1,480	109,334	108,400

D: Economy Interchange purchased from EPE

Total amounts purchased by APS are listed below. Part of this was generated in New Mexico and part was generated in Texas.

Year	1970	1971	1972	1973	1974	1975
Mwh	0	0	2,423	1,395	6,083	7,259

E: Economy Interchange purchased from SRP and TGE

Total amounts purchased by APS are listed below. Most of this was generated in Arizona, but small portions were generated in New Mexico.

Year	1970	1971	1972	1973	1974	1975
SRP (Mwh)	55,560	59,652	33,893	1,515	815	7,444
TGE (Mwh)	2,201	10,798	14,808	8,461	4,908	11,716

EL PASO ELECTRIC

ELECTRICITY PURCHASED FROM OTHER UTILITIES BY EPEC*

	1970 KWH	1971 KWH	1972 KWH	1973 KWH	1974 KWH	1975 KWH
PNM	—0—	480,000	11,570,000	735,000	30,840,000	20,858,000
TGE	—0—	140,000	—0—	—0—	20,000	—0—
SRP	—0—	—0—	—0—	640,000	145,000	200,000
APS	—0—	—0—	5,152,000	4,615,000	4,130,000	2,710,000
CRSP	—0—	—0—	—0—	30,000	—0—	—0—
CPS	—0—	—0—	—0—	—0—	—0—	19,626,000

Total electricity
purchased from
other utilities
by El Paso Electric
Company

—0—	620,000	16,722,000	6,020,000	35,135,000	43,394,000
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* KWH delivered to El Paso Electric Company at Four Corners Generating station in New Mexico; original source of generation unknown.

SALT RIVER PROJECT

1970—Four Corners #5 net test energy (accounted for as a purchase from the constructor, Bechtel Power Cor- poration)—SRP Portion	<u>70,025,680 kwh</u>
1971—Interchange from El Paso Electric	<u>16,910,000 kwh</u>
1972—Purchase from Plains Electric G & T	40,367,000 kwh
Economy Interchange from:	
El Paso Electric	72,797,000 kwh
Public Service of New Mexico	140,000 kwh
Southern California Edison	486,000 kwh
1972 Total	<u>113,790,000 kwh</u>
1973—Purchase from Plains Electric G & T	163,005,000 kwh
Interchange from El Paso Electric	840,000 kwh
Economy Energy from:	
El Paso Electric	30,518,000 kwh
Public Service of New Mexico	5,825,000 kwh
Tucson Gas & Electric	50,212,000 kwh
1973 Total	<u>250,400,000 kwh</u>
1974—Purchase from:	
El Paso Electric	14,483,000 kwh
Plains Electric G & T	228,156,000 kwh
Public Service of New Mexico	98,631,000 kwh
Tucson Gas & Electric	179,604,000 kwh
Interchange from El Paso Electric	289,000 kwh
1974 Total	<u>521,163,000 kwh</u>
1975—Purchase from:	
El Paso Electric	18,766,000 kwh
Plains Electric G & T	32,689,000 kwh
Public Service of New Mexico	94,735,000 kwh
Tucson Gas & Electric	5,465,000 kwh
1975 Total	<u>151,655,000 kwh</u>

SOUTHERN CALIFORNIA EDISON

Energy generated in New Mexico and purchased by SCE:

<u>Year</u>	<u>MWH</u>
1959 through	
1968	0
1969	6,652
1970	21,165
1971	104,721
1972	2,650
1973	40,567
1974	46,422
1975	181,467

Energy purchases listed above include the total purchased by SCE from Four Corners Project participants. Our records do not include the necessary data to determine what portion of the energy was generated in New Mexico.

TUCSON GAS & ELECTRIC

No purchases by TGE 1970 and 1971

1972	80,000 KWH
1973	40,000 KWH
1974	1,892,000 KWH
1975	73,619,000 KWH

Interrogatory No. 5. Please list the amount of electricity you generated in New Mexico and sold outside New Mexico in each year since 1959.

Answer to Interrogatory No. 5.

Objected to. However, plaintiffs, without waiving their objections, answer the question for the years 1970 through 1975 as the information is available.

ARIZONA PUBLIC SERVICE

In year 1975 the amount generated in New Mexico and sold outside by APS was 3,984,947 Mwh.

However, information is not available to make a direct answer for years preceding 1975, for the following reasons:

- A. There were sales of economy interchange energy by APS to PSNM and EPE during these years.
- B. These interchange sales are made hour-by-hour from whatever generators may be available.
- C. Hourly billing calculations are made automatically by computer which provides the total amount sold and the cost of generation. This is a composite mixture of power from several different generators.
- D. Due to prohibitive volumes of records, details of these calculations were not recorded. Only the composite totals were retained.
- E. A portion of the electricity generated by APS in New Mexico is included in these interchange sales to PSNM and EPE. It is not known what the quantity of this portion is.
- F. The following tabulation shows the known quantities and indicates where information is not available.

Year	1970	1971	1972	1973	1974	1975
APS Generation in N.M. Mwh	4,782,740	4,921,675	4,215,885	4,889,150	4,592,828	4,277,980
Less Portions Sold in N.M.:						
NTUA Firm	98,552	142,016	199,961	211,596	244,476	253,622
Utah Mining	23,109	27,508	28,661	29,891	34,603	38,841
PSNM Interchange	•	•	•	•	•	200
EPE Interchange	•	•	•	•	•	370
Remainder Sold Outside N.M.	•	•	•	•	•	3,984,947

• Indicates information not available.

EL PASO ELECTRIC
Generated by EPEC in New Mexico at

	1970	1971	1972	1973	1974	1975
Four Corners	475,054	597,062	688,613	669,261	591,231	457,593
Rio Grande	596,199	561,139	968,465	1,045,608	1,024,211	1,102,932
Total Gen. in N.M. by EPEC	1,071,253	1,158,201	1,657,078	1,714,869	1,615,442	1,560,525
Sold in New Mexico						
Retail	452,238	470,315	492,026	517,217	514,108	524,808
CPS (Almogordo)	78,553	81,246	93,813	101,953	106,532	105,317
Total Retail & CPS in N.M.	530,791	551,561	585,839	619,170	620,640	630,125
Sold in New Mexico Wholesale PNM	—0—	24,597	50,030	153,859	29,168	60
CPS (Lordsburg)	—0—	—0—	—0—	1,059	—0—	—0—
Total Wholesale in N.M.	—0—	24,597	50,030	154,918	29,168	60
Total Generated & Sold Outside New Mexico *	540,461	582,044	1,021,210	940,782	965,634	930,340

* Includes principally electricity for Company's customers in Texas, and for International Export to Republic of Mexico; also included are amounts sold to other utilities, delivered at Four Corners, New Mexico for ultimate consumption outside of New Mexico. Given in MWH.

SALT RIVER PROJECT

1970—SRP Portion—Four Corners #4 and #5 Generation	614,628,320 kwh
Four Corners Unit Tripping Interchange to Arizona Public Service ("APS")	3,755,000
Four Corners Unit Tripping Interchange, Over-schedule payback from APS	<u>- 711,000</u>
	- 3,044,000 kwh
1970 Net	<u>611,584,320 kwh</u>
1971—SRP—Four Corners #4 and #5	856,714,000 kwh
Four Corners Unit Tripping Interchange to APS	<u>- 50,000 kwh</u>
1971 Net	<u>856,664,000 kwh</u>
1972—SRP—Four Corners #4 and #5	983,937,000 kwh
Economy Energy to El Paso Electric	<u>- 400,000 kwh</u>
1972 Net	<u>983,537,000 kwh</u>
1973—SRP—Four Corners #4 and #5	956,236,000 kwh
Interchange to:	
El Paso Electric	730,000
Public Service of New Mexico	20,000
Economy Energy to:	
El Paso Electric	640,000
Tucson Gas & Electric	<u>40,000</u>
	- 1,430,000 kwh
1973 Net	<u>954,806,000 kwh</u>
1974—SRP—Four Corners #4 and #5	845,355,000 kwh
Interchange to El Paso Electric	253,000
Sale to El Paso Electric	<u>345,000</u>
	- 598,000 kwh
1974 Net	<u>844,757,000 kwh</u>
1975—SRP—Four Corners #4 and #5	653,048,000 kwh
Sale to:	
El Paso Electric	200,000
Public Service of New Mexico	320,000
Tucson Gas & Electric	<u>2,216,000</u>
	- 2,736,000 kwh
1975 Net	<u>650,312,000 kwh</u>

SOUTHERN CALIFORNIA EDISON

Energy generated by SCE in New Mexico and sold outside New Mexico:

Year	MWH
1959 through	
1968	0
1969	474,144
1970	3,249,643
1971	4,098,885
1972	4,720,663
1973	4,576,297
1974	4,054,820
1975	3,134,110

TUCSON GAS & ELECTRIC

Year	1970	1971	1972	1973	1974	1975
Generated in N. M.	473,518	597,538	688,860	941,616	1,765,999	1,673,588
Sold to Utilities	—0—	2,639	2,368	201,088	713,450	66,925
Sold to TGE						
Customers	473,518	594,899	686,492	707,150	956,952	1,605,138
Total Sales	473,518	597,538	688,860	908,238	1,670,402	1,672,063

Above energy figures are in MWH.

Interrogatory No. 6. Please list each power plant you owned during the period from 1960 to the present, and for each plant please state where it is located, its capacity in megawatts, when it was placed in service, whether it is still in service, its actual output each year, the type of plant (e.g., steam, or internal combustion, or hydroelectric, etc.) and the kind of fuel it used.

Answer to Interrogatory No. 6.

Objected to. However, as each of the plaintiffs in this action are, or were at one time, participants in the Palo

Verde Nuclear Generating Station the information requested in this interrogatory was gathered in a slightly different form and supplied to answers to interrogatories in the Nuclear Regulatory Commission proceedings regarding PVNGS. That information is attached to these answers for defendant's use. However, plaintiffs do not waive their objections to this interrogatory by volunteering this information.

Interrogatory No. 7. Please identify each agreement under which coal has been or is being purchased for burning in the Four Corners Plant or the San Juan Plant. If you will do so without a motion to produce, please attach a copy of the agreement to your answers.

Answer to Interrogatory No. 7.

Objected to.

Interrogatory No. 8. Please identify any planning studies or any other similar reports or documents prepared by you or a consultant that deal in any way with the feasibility or desirability of constructing the Four Corners Plant or the San Juan Plant in New Mexico. If you will do so without a motion to produce, please attach a copy of the document to your answers.

Answer to Interrogatory No. 8.

Objected to.

Interrogatory No. 9. Please identify each person whom you expect to call as a witness at the trial of this case and state the subject matter upon which he or she is expected to testify.

Answer to Interrogatory No. 9.

Fred O'Chesky

Einer Greve

Henry Sergeant

Martin Kuric

C. M. Perkins

Phoebe Fornaciari

Carl Turner

A. C. Maxwell

Stan Bizant

STATE OF NEW MEXICO)
COUNTY OF SANTA FE) ss.

BRUCE NORTON, being first duly sworn, upon oath states that he is one of the attorneys for plaintiffs in the above entitled cause; that all of said plaintiffs maintain their offices outside the State of New Mexico wherein this cause is pending, and Affiant makes this verification on behalf of each of said plaintiffs; that he has read and knows and understands the matters and things stated in the foregoing Answers to Defendant Bureau of Revenue's Interrogatories and that the same are true according to his information and belief.

/s/ BRUCE NORTON
Bruce Norton

SUBSCRIBED and sworn to before me this 14th day of September, 1976.

/s/ DOROTHY B. LOPE
Notary Public

My commission expires: 6-1-80.

I certify that I mailed a copy of the foregoing pleading to opposing counsel of record on 9-14-76.

/s/ RICHARD L. CARPENTER

Plaintiffs' Motion for Summary Judgment

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

Filed September 15, 1978

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiffs, by and through their attorneys,
and, pursuant to Rule 56, N.M.R.C.P., move for summary
judgment in their favor on all issues raised by the Com-
plaint herein.

In support thereof, movants state that annexed hereto
and incorporated herein by reference are supporting affi-
davits, being Affidavit Nos. 1-7, inclusive, and that the
pleadings and answers to interrogatories on file, together
with the affidavits, show that there is no genuine issue as
to any material fact and that the movants are entitled to
judgment as a matter of law.

WHEREFORE, plaintiffs pray that the Court enter its order
rendering them summary judgment on the issues raised
by their Complaint.

Respectfully submitted,
FRANK ANDREWS, III, Esq.
MONTGOMERY, FEDERICI, ANDREWS &
HANNAHS
P. O. Box 2307
Santa Fe, New Mexico 87501

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Santa Fe, New Mexico 87501
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3100 Valley Center
Phoenix, Arizona 85073

/s/ By BRUCE NORTON, Esq.
Bruce Norton, Esq.
BIGBEE, STEPHENSON, CARPENTER &
CROUT

/s/ By RICHARD N. CARPENTER
Richard N. Carpenter, Esq.
Attorneys for Plaintiffs

I certify That I mailed a copy of the foregoing pleading
to opposing counsel of record on 9/18/76

/s/ RICHARD N. CARPENTER

Affidavit of Henry B. Sargent, Jr.**(Affidavit No. 1 to Plaintiffs' Motion for Summary Judgement)**

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

STATE OF ARIZONA)
) ss.
County of)

HENRY B. SARGENT, JR., being first duly sworn, upon his
oath, deposes and says:

1. That he is the Vice President and Treasurer of ARIZONA PUBLIC SERVICE COMPANY and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edison), and El Paso Electric Company (EPE).

3. APS is an Arizona corporation with its principal office in Phoenix, Arizona, and as a public service corporation APS is regulated by the Arizona Corporation Commission.

4. APS distributes electricity at retail in Arizona over an area which encompasses approximately 50,335 square miles and an estimated population of 1,065,000.

5. As of December 31, 1974, the aggregate generating capability of APS's facilities was 2,143.4 megawatts of rated capacity, of which 812 megawatts of rated capacity or 37.9% is generated in New Mexico.

6. The Four Corners Power Plant is situated on lands leased from the Navajo Tribe of Indians, wholly within the Navajo Indian Reservation. Units 1, 2 and 3 of the Four Corners Power Plant are owned entirely by APS. Units 4 and 5 of the Four Corners Power Plant are owned by the following utilities as co-tenants with their undivided interests set opposite their respective names:

Southern California Edison Company	48%
Arizona Public Service Company	15%
Public Service Company of New Mexico	13%
Salt River Project Agricultural Improvement and Power District	10%
Tucson Gas and Electric Company	7%
El Paso Electric Company	7%

APS operates Units 4 and 5 as agent for the other co-tenants. As defined in an Operating Agreement and a Co-Tenancy Agreement among the co-owners, each co-tenant is entitled to its respective percentage of the generating capacity entitlement. Whenever any co-tenant directs the generation of energy from either Unit, the other co-tenants are required to operate same at minimum load. The co-tenants share costs and expenses according to their respective percentages as provided in these agreements.

7. For 1975, APS paid or became liable for the following New Mexico taxes:

Apportioned Corporate Income	Ad Valorem Taxes			
	San Juan	M. Kinley		
\$54,506	\$791,583	\$ 1,373		

Corporate Franchise	Gross Receipts	Compensating	Unemployment	Excise
\$25,720	\$25,459 ⁽¹⁾	\$225,539 ⁽²⁾	\$25,713 ⁽³⁾	\$87,814

- (1) Applicable to energy supplied to Utah International, Inc. for production of coal for Four Corners Power Plant. The tax paid constitutes an operating expense chargeable to co-owners in accordance with agreements.
- (2) Applicable to purchase of property for Four Corners Power Plant and chargeable to co-owners in accordance with agreements.
- (3) Applicable to payrolls at Four Corners Plant Station and chargeable to co-owners in accordance with agreements.

Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the APS electrical system is directly or indirectly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The interconnecting transmission lines constitute an interstate grid encompassing the entire western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities schematically represented on Exhibit B annexed hereto. Transmission paths to the load centers of each plaintiff are represented on Exhibit C. APS' entitlement at Four Corners (or energy purchased from others at Four Corners) is transmitted to its load centers over transmission facilities owned by APS and USBR.

10. As a consequence of the system interconnections described in Paragraph Eight, the demand for electricity in the major urban centers served by plaintiffs in Arizona, southern California, and the El Paso area of West Texas determines in substantial degree the amount of electrical energy generated at the plaintiffs' generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand, to which each plaintiff is entitled according to its respective ownership of the generation facilities, is transformed and instantaneously transmitted at the speed of light, along existing transmission lines to that plaintiff's service area.

11. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners, energy is generated on Units 1, 2 and 3 (wholly-owned by APS) at 20 kilovolts and at 22 kv on Units 4 and 5. After generation, the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various trans-

mission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 5 at 22 kv is transformed to 500 kv for delivery at the bus tie to APS' 500 kv transmission line and thence to Edison's service areas in California; energy generated on Unit 4 at 22 kv is transformed to 345 kv for delivery at the bus ties to APS', UPL's, and PNM's transmission lines; and energy generated on Units 1, 2 and 3 at 20 kv is transformed to 230 kv for delivery at the bus tie to PNM's and USBR's transmission lines and is again transformed to 345 kv for delivery through the 345 kv bus. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. All energy delivered to APS at the 500 kv Four Corners bus is transmitted to Edison's service areas in California; energy delivered to APS' transmission lines at the 345 kv Four Corners bus is transmitted to the APS and TGE service areas in Arizona; and all energy delivered to TGE's transmission line at the 345 kv San Juan bus is transmitted to its service areas. Energy delivered to PNM at the Four Corners 345 kv and 230 kv buses, or at the San Juan 345 kv bus, is available both for transmission to EPE's kv line interconnected at PNM's West Mesa substation near Albuquerque, and for wholesale sale or retail distribution to PNM's New Mexico customers. Energy delivered at the Four Corners 230 kv bus to the USBR is available both for transmission of SRP's entitlement at Four Corners to its service areas in Arizona and

for delivery to rural cooperatives which transmit and distribute electricity in New Mexico.

12. In 1975, APS sold 254,087,410 kwh to the Navajo Tribal Utility Authority (NTUA). Of this energy sold, 5,309,183 kwh or 2% was delivered at Indian Wells and White Cane in Arizona and 248,778,227 kwh or 98% was delivered in New Mexico.

13. Electrical energy required for operation of the Navajo mine which provides fuel for the Four Corners Power Plant is sold to Utah International, Inc. by APS. The New Mexico Electrical Energy Tax, as measured by energy sold at retail to Utah International, Inc. is entirely offset by the credit under § 9B. That is, APS' 1975 electrical energy tax liability of \$15,536.40 upon sales of 30,841,000 kwh at retail to Utah International, Inc. would be recouped by the § 9B credit against APS' 1975 New Mexico gross receipts tax liability of \$25,459.00.

14. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation," and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. Also, APS has individual contracts with PNM providing for purchases and sales of economy and emergency energy and with TGE for purchase of contingent power and energy from San Juan. The point of delivery for energy supplied under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal

Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

15. 1975 wholesale sales and transfers made by APS in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	TGE	SRP	Edison	PNM	EPE
Delivered	795,000	—0—	59,385,000	1,785,000	3,445,000
Received	5,898,000	—0—	1,361,000	108,400,000	7,466,000

In 1975 APS delivered 253,621,603 kwh to the Navajo Tribal Authority (NUTA), an enterprise of the Navajo Nation, for distribution and resale on the Navajo Indian Reservation. During 1975 APS also delivered 6,670,000 kwh to, and received 456,217,000 kwh from, Utah Power & Light Company.

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesale purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Electrical Energy Tax Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions require each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

16. On September 25, 1975, APS timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by APS in New Mexico was 417,874,000 kwh, and the amount due under the Electrical Energy Tax

for such period was \$167,149.60. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by APS.

17. APS is subject to the following Arizona taxes and in 1975 paid or became liable for the amounts shown:

<u>Corporate Income</u>	<u>Unemployment</u>	<u>State Sales</u>	<u>City Sales</u>	<u>State Use</u>
\$1,515,687	\$87,317	\$12,315,992	\$1,193,116	\$769,502
<u>City Use</u>	<u>Ad Valorem</u>	<u>City Franchise</u>	<u>Excise and Other</u>	
\$63,355	\$35,762,052	\$3,629,957	\$779,760	
TOTAL: \$56,116,738				

Similar liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico, in respect of which the Electrical Energy Tax is payable, is sold by APS at retail to consumers in Arizona subject to the state and city taxes shown above. There is no provision of Arizona law under which APS is entitled to any credit, offset, rebate or other form of recoupment for the Electrical Energy Tax paid in respect of such energy.

/s/ HENRY B. SARGENT, JR.
Henry B. Sargent, Jr.

SUBSCRIBED AND SWORN to before me this 10th day of September, 1976.

/s/ MARY F. TRENBERTH
Notary Public

My commission expires: Nov. 9, 1978.

Affidavit of Martin P. Kuric
(Affidavit No. 2 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
 COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
 AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
 COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue,
 BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

STATE OF TEXAS)
) ss.
 County of El Paso)

MARTIN P. KURIC, being first duly sworn, upon his oath,
 deposes and says:

1. That he is the Vice President of EL PASO ELECTRIC
 COMPANY, and as such is authorized to make this Affidavit,
 and that statements herein are made upon his personal
 knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public
 Service Company (APS), Tucson Gas & Electric Company
 (TGE), Salt River Project Agricultural Improvement and
 Power District (SRP), Southern California Edison Com-
 pany (Edsion), and El Paso Electric Company (EPE).

3. EPE is a Texas corporation and is regulated as a pub-
 lic utility in New Mexico by the Public Service Commission
 and in Texas by the cities of El Paso, Van Horn, Anthony
 and Clint.

4. EPE distributes electricity at retail in south central
 New Mexico and metropolitan El Paso, over 10,000 square
 miles and to an estimated population of 495,000.

5. The aggregate generating capability of EPE facili-
 ties is 999 megawatts of rated capacity, of which 489 mega-
 watts of rated capacity or 48.9% is generated in New
 Mexico.

6. EPE owns and operates the Rio Grande Generating
 Station near Anapra, New Mexico. The Four Corners
 Power Plant Units 4 and 5 are owned by the plaintiffs as
 co-tenants with EPE having a 7% undivided interest (112
 megawatts).

7. For 1975, EPA paid or became liable for the following
 New Mexico taxes:

	Ad Valorem Taxes				
	Otero	Sierra	Bernalillo	Luna	Valencia
	\$ 18,525.47	\$12,711.23	\$11,986.00	\$1,936.18	\$ 5,706.26
Apportioned Corporate Income	San Juan	Socorro		Elephant Butte Irri- gation Dist.	Dona Ana
\$122,985.77	\$ 70,974.20	\$18,798.10		\$ 132.09	\$531,637.78
Corporate Franchise	Gross Receipts	Compensating	Unem- ployment		
\$ 12,441.55	\$404,582.86	\$35,796.40	\$11,144.57		

- (1) Applicable to energy supplied to Utah International, Inc. for produc-
 tion of coal for Four Corners Power Plant. The tax paid constitutes an
 operating expense chargeable to co-owners in accordance with agree-
 ments.
- (2) Applicable to purchase of property for Four Corners Power Plant and
 chargeable to co-owners in accordance with agreements.
- (3) Applicable to payrolls at Four Corners Plant Section and chargeable
 to co-owners in accordance with agreements.

Similar New Mexico tax liabilities apply for 1976 and are
 reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the EPE electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The interconnecting transmission lines constitute an interstate grid encompassing the entire Western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities schematically represented on Exhibit B annexed hereto. Transmission paths to the load centers of each plaintiff are represented on Exhibit C. EPE's entitlement at Four Corners is transmitted over PNM's 345 kv lines to its West Mesa Substation near Albuquerque, thence over EPE's 345 kv transmission lines to its service areas in southern New Mexico and the El Paso Metropolitan area.

10. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners, energy is generated at 22 kv on Units 4 and 5. At EPE's Rio Grande Station, energy is generated at 14 kv. After generation, at these stations, the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electro-

magnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 4 at 22 kv is transformed to 345 kv for delivery at the bus ties to APS's and PNM's transmission lines; and energy generated on Units 1, 2 and 3 at 20 kv is transformed to 230 kv for delivery at the bus tie to PNM's and USBR's transmission lines and is again transformed to 345 kv for delivery through the 345 kv bus. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. Energy delivered to PNM at the Four Corners 345 kv and 230 kv buses, or at the San Juan 345 kv bus, is available both for transmission to EPE's 345 kv line interconnected at PNM's West Mesa substation at Albuquerque, and for wholesale sale or retail distribution to PNM's New Mexico customers.

11. EPE distributes electricity as a public utility at retail in New Mexico, serving an area in south central New Mexico. The Electrical Energy Tax measured by electricity sold by EPE at retail in New Mexico will be fully offset by gross receipts tax credits under § 9B of the Electrical Energy Tax Act (the Act), while the tax measured by electricity transmitted to EPE's service area in Texas and to the U.S.-Mexican border for export will not be offset by and credit.

12. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be pur-

chased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

13. 1975 wholesale sales and transfers made by EPE in 1974 to plaintiffs in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	APS	TGE	SRP	Edison	PNM
Delivered	6,524,000	2,207,000	18,766,000	—0—	60,000
Received	2,710,000	—0—	200,000	—0—	20,858,000

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesaler purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions required each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual

credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

14. On September 25, 1975, EPE timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by EPE in New Mexico was 155,314,000 kwh, and the amount due under the Electrical Energy Tax for such period was \$62,126.00. Because EPE is entitled to recover the Electrical Energy Tax on energy sold by it to New Mexico consumers by credit under § 9B of the Act, since 60,593,248 kwh of EPE's energy generated in New Mexico was consumed in New Mexico, EPE paid \$24,237.30 of the total tax, leaving an unpaid balance of \$37,806.70. That balance was duly protested by EPE without payment in accordance with § 72-13-38 N.M.S.A., 1953. The tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by EPE.

15. EPE is subject to the following Texas and municipal taxes and in 1975 became liable for the amounts shown below:

State Ad Valorem	\$ 750,191.53
City Ad Valorem	1,138,272.23
City Occupation	893,888.44
Gross Receipts	1,139,942.88
Compensating	24,464.66
Corporate Franchise	135,694.00
Unemployment	2,208.37

Similar liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico in respect of which the Electrical Energy Tax is payable, is sold by EPE at retail to consumers in Texas, subject to the gross receipts taxes shown above. There is no provision of Texas

law under which EPE is entitled to any credit, offset, rebate or other form of recoupment for the Electrical Energy Tax paid in respect of such energy.

16. The practical application of the Electrical Energy is illustrated by the following information showing its impact upon EPE. The figures shown are based upon the actual experiences of EPE for July 1, 1975 (the effective date of the Electrical Energy Tax) through March, 1976.

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
ANALYSIS OF SYSTEM INPUT

JULY, 1975 THRU MARCH, 1976

Schedule 1

<u>LINE NO.</u>	<u>SOURCE OF INPUT</u>	<u>MWH</u>
	<u>GENERATION IN NEW MEXICO</u>	
	By El Paso Electric Company	
1	At Four Corners	437,701.000
2	At Rio Grande	762,053.000
	Total Generation in New Mexico	
3	By El Paso Electric Company	1,199,754.000
	<u>GENERATION IN NEW MEXICO</u>	
	By Other Utilities and Purchased	
	By El Paso Electric Company	
4	PNM	11,552.000
5	CPS	9,645.000
	Total Generation in New Mexico	
6	By Others	21,197.000
7	Total Generation in New Mexico	1,220,951.000
	<u>GENERATION ELSEWHERE</u>	
8	By El Paso Electric Company in Texas	1,397,477.000
	By Other Utilities and Purchased by El Paso Electric Company	
9	PNM	5,043.000
10	UPL	11,790.000
11	APS	315.000
12	SRP	200.000
13	Total Generation Elsewhere	1,414,825.000
14	TOTAL SYSTEM INPUT	<u>2,635,776.000</u>

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
ANALYSIS OF SYSTEM SALES

JULY, 1975 THRU MARCH, 1976

Schedule 2

LINE NO.	MWH	
		GENERATED AND SOLD IN NEW MEXICO
1		To El Paso Electric Co. Retail Customers 394,743.728
		TO WHOLESALE CUSTOMERS
2	PNM	4,339.000
3	APS	6,037.000
4	CPS	80,540.000
5	RG CO-OP (DELL CITY, N.M.)	3,196.439
6	TGE	270.000
7	SRP	550.000
8		TOTAL GENERATED BUT SOLD IN NEW MEXICO TO WHOLESALE CUSTOMERS 92,932.439
		NOT GENERATED BUT SOLD IN NEW MEXICO TO EL PASO ELECTRIC CO. RETAIL CUSTOMERS 4,755.074
9		TO WHOLESALE CUSTOMERS
10	PNM	200.000
11	SRP	250.000
12	APS	857.000
		TOTAL NOT GENERATED BUT SOLD IN NEW MEXICO TO WHOLESALE CUSTOMERS 1,307.000
13		TOTAL SALES IN NEW MEXICO SOLD IN TEXAS 495,738.241
14		TO EL PASO ELECTRIC CO. RETAIL CUSTOMERS 1,709,272.075
15		TO WHOLESALE CUSTOMERS
16	RG CO-OP—Dell City, Texas	20,371.561
17	RG CO-OP—Van Horn	6,304.800
18		TOTAL WHOLESALE SOLD IN TEXAS 26,676.361
19		TOTAL SALES IN TEXAS 1,735,948.436
20		SOLD AT INTERNATIONAL BORDER (MEXICO) 240,840.000
21		TOTAL MWH SALES <u>2,472,526.677</u>

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
ELECTRICAL ENERGY TAXES BORNE
BY EL PASO ELECTRIC COMPANY

Schedule 3
Generation
Tax

LINE NO.	MWH	
		TAX BASED ON EL PASO ELECTRIC COMPANY GENERATION
		Total Generation by El Paso Electric Company in New Mexico 1,199,754.000 \$479,901.60
		TAX BASED ON GENERATION BY OTHER UTILITIES; CREDIT ASSIGNED TO EL PASO ELECTRIC COMPANY; EL PASO ELECTRIC COMPANY TO REIMBURSE ASSIGNOR
		Assignor
2	PNM	*11,552.000 2,436.40
3	CPS	9,645.000 3,858.00
4		Total Electrical Taxes Borne By El Paso Electric Company <u>1,220,951.000</u> <u>\$486,196.00</u>

* Analysis

	MWH	Gen. Tax at .4 Mills
1/2 Tax	10,922.000	\$2,184.40
Full Tax	630.000	252.00
TOTAL	<u>11,552.000</u>	<u>\$2,436.40</u>

Schedule 4

EL PASO ELECTRIC COMPANY
NEW MEXICO ELECTRICAL ENERGY TAX
RECOVERY OF TAXES BORNE BY EL PASO ELECTRIC COMPANY
JULY, 1975 THRU MARCH, 1976

LINE No.		MWH		Energy Tax at 0.4 Mills	Credit To El Paso Electric Gr. Rec. Tax	Credit Assigned To Other	Recovered Elsewhere (Tex., Etc.)
		COL. A	COL. B	COL. C	COL. D	COL. E	COL. F
1	Retail Sales	394,743.728	421,395.799	\$166,373.92	\$166,373.92	\$	\$
	Wholesale Sales						
2	PNM	4,339.000	4,339.000	1,735.60	223.40	1,512.20	1,187.60
3	APS	6,037.000	6,037.000	2,414.80		1,227.20	
4	CPS	80,540.000	83,761.600	33,504.64		33,504.64	
5	RG CO-OP (Dell City, N.M.)	3,196.439	3,516.085	1,406.44		1,406.44	
6	TGE	270.000	270.000	108.00		54.00	54.00
7	SRP	550.000	550.000	220.00		110.00	110.00
	SALES NOT GENERATED BUT SOLD IN MEXICO BY EL PASO ELECTRIC CO.						
8	Retail Sales	4,755.074	5,043.000	—0—			
	Wholesale Sales						
9	PNM	200.000	200.000	—0—			
10	SRP	250.000	250.000	—0—			
11	APS	857.000	857.000	—0—			
	TOTAL SALES IN NEW MEXICO BY EL PASO ELECTRIC COMPANY	495,738.241	526,219.484	\$205,763.40	\$166,597.32	\$37,814.48	\$ 1,351.60
	SALES OTHER THAN NEW MEXICO						
13	Texas (Retail & Wholesale)	1,735,948.436					
14	Republic of Mexico	240,840.000					
	TOTAL SALES OTHER THAN NEW MEXICO	1,976,788.436		\$280,432.60	—0—	—0—	\$280,432.60
16	GRAND TOTAL	2,472,526.677		\$486,196.00	\$166,597.32	\$37,814.48	\$281,784.20

For the period from July, 1975 through March, 1976, the Electrical Energy Tax applicable to EPE is measured by the energy generated by EPE in New Mexico, 1,199,754.000 MWH (Schedule 1, Line 3), plus the energy purchased at wholesale from other plaintiffs, 21,197.00 MWH (Schedule 1, Line 6). The total generation in New Mexico totals 1,220,951.000 MWH (Schedule 1, Line 7). The tax is \$.40 per MWH which amounts to \$486,196.00 (Schedule 3, Line 4). Of that amount, \$204,411.80 (Schedule 4, Line 16, Columns D and E), is offset by credits under § 9B or by reimbursements under § 9C, and the balance of \$281,784.20 (Schedule 4, Line 16, Column E) is payable by EPE.

17. EL PASO ELECTRIC COMPANY is in direct competition with intrastate New Mexico utilities. This competitive situation arises in three areas:

- (1) in the serving of other utilities at wholesale rates;
- (2) in the serving of large industrial loads where the industry has the option of locating in either an El Paso area of service or that of another utility; and
- (3) in the serving of large governmental and industrial loads which are to be located in uncertified areas for which any New Mexico utility can compete.

/s/ MARTIN P. KURIC
Martin P. Kuric

SUBSCRIBED AND SWORN to before me this 10th day of September, 1976.

/s/ CHARLES MAIS
Notary Public

My commission expires:

CHARLES MAIS, Notary Public
In and for the County of El Paso, Texas.

Affidavit of C. M. Perkins
(Affidavit No. 3 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
 COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
 AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
 COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue,
 BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

STATE OF ARIZONA)
) ss
 County of)

C. M. PERKINS, being first duly sworn, upon his oath, deposes and says:

1. That he is the Director of Project Planning of SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.

2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edison), and El Paso Electric Company (EPE).

3. Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona operating a federal reclamation project pursuant to contracts with the Secretary of the Interior. SRP

distributes electricity at retail in Central Arizona, including metropolitan Phoenix, an area which encompasses approximately 2,900 square miles and an estimated population of 675,000. SRP also distributes electricity at wholesale to Pinal and Gila Counties, an area of approximately 2,400 square miles.

4. The 1975 aggregate generating capability of SRP's facilities is 2,197 megawatts of rated capacity, of which 160 megawatts of rated capacity or 7.3% is generated in New Mexico.

5. The Four Corners Power Plant Units 4 and 5 are owned by the plaintiffs as co-tenants with SRP having a 10% undivided interest.

6. For 1975, SRP paid or became liable for the following New Mexico taxes for San Juan County: \$111,158.00. Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

7. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the SRP electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The interconnecting transmission lines constitute an interstate grid encompassing the entire Western United States and portions of Canada and the Republic of Mexico.

8. Deliveries of energy at Four Corners and San Juan Generating Stations are made through switchyard facilities represented on Exhibit B annexed hereto. A portion of SRP's entitlement at Four Corners is delivered to its load centers via U.S. Bureau of Reclamation (USBR) transmission lines through Shiprock and Flagstaff; the bal-

ance is exchanged with USBR for other energy delivered in Arizona.

9. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners energy is generated at 22 kv on Units 4 and 5. After generation, the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 4 at 22 kv is transformed to 345 kv for delivery at the bus ties to APS' and PNM's transmission lines; and energy generated on Units 1, 2 and 3 at 20 kv is transformed to 230 kv for delivery at the bus tie to PNM's and USBR's transmission lines and is again transformed to 345 kv for delivery through the 345 kv bus. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. Energy delivered at the Four Corners 230 kv bus to the USBR is available both for transmission of SRP's entitlement at Four Corners to its service areas in

Arizona and for delivery to rural cooperatives which transmit and distribute electricity in New Mexico.

10. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

11. 1975 wholesale sales and transfers made by SRP in accordance with the agreements described in the preceding paragraph, are set forth in the following tables:

	APS	TGE	Edison	PNM	EPE	Other New Mexico Utilities
Delivered	—0—	2,216,000	—0—	320,000	200,000	—0—
Received	—0—	1,145,000	—0—	94,735,000	18,766,000	32,689,000

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesale purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Electrical Energy Tax Act requires the purchaser to reim-

burse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions required each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

12. On September 25, 1975, SRP timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by SRP in New Mexico was 48,145,000 kwh, and the amount due under the Electrical Energy Tax for such period was \$19,258.00. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by SRP.

13. SRP is subject to the following Arizona taxes and in 1975 became liable for the amounts shown:

<u>Corporate Income</u>	<u>Unemployment</u>	<u>State Sales</u>	<u>City Sales</u>	<u>State Use</u>
[Exempt]	\$3,135	\$6,943,943	\$2,357,498	\$1,446,091
<u>City Use</u>	<u>Ad Valorem</u>	<u>City Franchise</u>	<u>Excise and Other</u>	
\$9,610	\$16,621,310*	None	\$104,536	
TOTAL:	\$27,486,123			

* Voluntary payments

Similar liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico, in respect to which the Electrical Energy Tax is payable, is sold by SRP at retail to consumers in Arizona subject to the state and city taxes shown above. There is no provision of Arizona

law under which SRP is entitled to any credit, offset, rebate or other form of recoupment for the Electrical Energy Tax paid in respect to such energy.

/s/ ILLEGIBLE

SUBSCRIBED AND SWORN to before me this 13th day of September, 1976.

/s/ ILLEGIBLE

My commission expires: May 3, 1979

Affidavit of A. L. Maxwell
(Affidavit No. 4 to Plaintiffs' Motion for Summary Judgement)

STATE OF NEW MEXICO COUNTY OF SANTA FE
 IN THE DISTRICT COURT
 No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC
 COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
 AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
 COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue,
 BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

STATE OF CALIFORNIA)
) ss.
 County of Los Angeles)

A. L. MAXWELL, being first duly sworn, upon his oath, deposes and says:

1. That he is a Vice President of SOUTHERN CALIFORNIA EDISON COMPANY, and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal knowledge and belief.
2. The plaintiffs in this proceeding are Arizona Public Service Company (APS), Tucson Gas & Electric Company (TGE), Salt River Project Agricultural Improvement and Power District (SRP), Southern California Edison Company (Edison), and El Paso Electric Company (EPE).
3. Edison is a California corporation with its principal office in Rosemead, California, and it is regulated as a public utility by the California Public Utility Commission.
4. Edison distributes electricity at retail in Central and Southern California outside Los Angeles and certain

other cities, an area which encompasses approximately 50,000 square miles and an estimated population of 7,560,000.

5. The aggregate generating capability of Edison's facilities is 13,699 megawatts of rated capacity, of which 768 megawatts of rated capacity or 5.6% is generated in New Mexico.

6. The Four Corners Power Plant Units 4 and 5 are owned by the plaintiffs as co-tenants with Edison having a 48% undivided interest.

7. For 1975, Edison paid or became liable for the following New Mexico taxes:

Apportioned Corporate Income	San Juan	Corporate Franchise
\$8,976	\$538,763	\$10

Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the Edison electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PSM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). Edison's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnecting transmission lines constitute an interstate

grid encompassing the entire western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities represented on Exhibit B annexed hereto. Edison's entitlement at Four Corners is transmitted to its Eldorado Substation in Nevada over APS' 500 kv transmission line to the Arizona line and Edison's 500 kv line thence to such Substation.

10. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the markets in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At Four Corners energy is generated at 22 kv on Units 4 and 5. After generation the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. At Four Corners, energy generated on Unit 5 at 22 kv is transformed to 500 kv for delivery at the bus tie to APS' 500 kv transmission line and thence to Edison's service areas in California. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. All energy delivered to APS at the 500 kv Four Corners bus is transmitted to Edison's service areas in California.

11. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

12. 1975 wholesale sales and transfers made by Edison to plaintiffs in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	APS	TGE	SRP	PNM	EPE
Delivered	11,513,000	800,000	—0—	—0—	3,050,000
Received	36,272,000	1,238,000	—0—	12,449,000	2,012,000

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plaintiff in whole or in part to the wholesale purchaser. Where

the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico", § 9C of the Electrical Energy Tax Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions require each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

13. On September 25, 1975, Edison timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by Edison in New Mexico was 231,003,000 kwh, and the amount due under the Electrical Energy Tax for such period was \$92,401.20. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The Tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by Edison.

14. Edison is subject to the following Arizona taxes and in 1975 became liable for the amounts shown below:

Corporate Income	Unemployment	State Sales	City Sales	State Use
\$9,173	\$78	—0—	—0—	\$55
City Use	Ad Valorem	City Franchise	Excise and Other	
—0—	\$329,481	—0—	—0—	
TOTAL: \$338,787				

Similar liabilities were incurred during 1976 and are reasonably expected for later years.

There is no provision of Arizona law under which Edison is entitled to any credit, offset, rebate or other form of

recoupment for the Electrical Energy Tax paid in respect of such energy.

15. Edison is subject to the following California taxes and in 1975 paid the amounts shown:

Franchise Requirements	\$ 11,850,291
Corporate Income	12,461,716
Unemployment	1,113,281
Use	3,712,821
Ad Valorem	84,602,841
Excise (gasoline, etc.)	420,000
Utility Users—Cities	16,100,000
TOTAL	\$130,260,950

- (1) 22 chartered cities in Edison's service territory impose taxes on consumers of electricity ranging from 3% to 8% of Edison's bills for electric service. Edison collects the tax without charge for the benefit of the cities. The California Sales and Use Tax Law, Revenue and Taxation Code § 6353, exempts Edison from the state sales tax, sales of gas, electricity, and water.

Similar tax liabilities are reasonably expected for later years. In addition, Edison has begun collection of a state tax on consumers of electricity at the rate of 1/10 of one mill per kilowatt hour. That tax will total approximately \$4 million in 1975.

Electrical energy generated in New Mexico, in respect of which the Electrical Energy Tax is payable, is sold by Edison at retail to consumers in California subject to state and municipal taxes as shown above. There is no provision of California law under which Edison is entitled to any credit, offset, rebate, or other form or recoupment for the Electrical Energy Tax paid in respect of such energy.

/s/ A. L. MAXWELL

My commission expires June 18, 1977.

4. TGE distributes electricity at retail in the greater metropolitan Tucson and Fort Huachuca areas, a certifi-

cated service area which encompasses approximately 1,155 square miles and an estimated population of 440,000.

5. The aggregate generating capability of TGE's facilities is 1,192 megawatts of rated capacity, of which 277 megawatts of rated capacity or 23.2% is generated in New Mexico.

6. TGE and Public Service Company of New Mexico (PNM) are equal co-owners of the San Juan Generating Station, of which generating Unit 2 is presently in operation. The Four Corners Power Plant Units 4 and 5 are owned by the plaintiffs as co-tenants with TGE having a 7% undivided interest.

7. For 1975, TGE paid or became liable for the following New Mexico taxes:

Apportioned Corporate Income	San Juan	McKinley	Ad Valorem Taxes Valencia	Catron
\$39,000 (Est)	\$475,182	\$181,889	\$35,288	\$104,084

Corporate Franchise	Compen- sating	Excise
\$10	\$48,427	\$31

TOTAL: \$883,911

Similar New Mexico tax liabilities apply for 1976 and are reasonably expected for later years.

8. As shown on the Map of Principal Transmission Lines annexed to the Complaint and attached hereto as Exhibit A, the TGE electrical system is directly interconnected with the electrical system of each other plaintiff in this cause, and either directly or indirectly interconnected with the electrical systems of Public Service Company of New Mexico (PNM), United States Bureau of Reclamation (USBR), and Utah Power & Light Company (Utah P&L). The inter-

connecting transmission lines constitute an interstate grid encompassing the entire Western United States and portions of Canada and the Republic of Mexico.

9. Deliveries of energy at the Four Corners and San Juan Generating Stations are made through switchyard facilities represented on Exhibit B annexed hereto. Transmission paths to the load centers of each plaintiff are represented on Exhibit C. APS' and TGE's entitlements at Four Corners (or energy purchased from others at Four Corners) and TGE's share of power and energy generated at San Juan are transmitted to their respective load centers over transmission facilities owned by APS and TGE.

10. Before it can be transmitted to market areas within or without New Mexico, electrical energy generated in New Mexico must be transformed as shown on Exhibit B and allocated by switchyard facilities to the transmission lines shown on Exhibit C, which serve particular markets. Before such transformation and allocation, the market in which energy will be distributed cannot be identified.

Exhibit B. Exhibit B shows schematically the relation between generation, transformation, and transmission at the Four Corners and San Juan Generating Stations. At San Juan, energy is generated at 24 kv, and after generation the voltage of the energy must be increased by transformers (shown as wavy lines on Exhibit B) to the voltages required by the various transmission lines. Transformers change voltage by electromagnetic induction, producing an induced current at higher or lower voltage, which is then allocated to particular transmission lines through the switchyard facilities. The transformers between bus bars shown on Exhibit B both "step up" and "step down" the voltages of the energy, which "flows" in either direction between buses at different times. No one generator on the interconnected system serves a particular transmission line.

Exhibit C. Exhibit C shows schematically the transmission paths from New Mexico generating stations to relevant markets. Energy delivered to APS' transmission lines

at the 345 kv Four Corners bus is transmitted to the APS and TGE service areas in Arizona; and all energy delivered to TGE's transmission line at the 345 kv San Juan bus is transmitted to its service areas.

11. The plaintiffs, as co-tenants of the Four Corners Power Plant, have made agreements for economy and emergency sales of energy. A "Six Party Economy Energy Agreement" provides for voluntary sales of energy when available energy of the interconnected systems can be purchased more economically than employing additional generators on the buyer's system, and "Principles of Interconnected Operation", and a "Unit Tripping Agreement" provide for emergency services as required by a co-tenant. The point of delivery for energy supplies under those agreements is ordinarily agreed upon between the parties. Where the switchyards at the Four Corners Power Plant are the only points of interconnection between the parties' systems, deliveries are necessarily made in New Mexico. All such sales of energy are wholesale sales in interstate commerce over which the Federal Power Commission has exclusive jurisdiction (except in the case of SRP which is not subject to such jurisdiction). The agreements referred to above have been filed as tariffs with the FPC on behalf of each of the plaintiffs, except SRP.

12. 1975 wholesale sales and transfers made by TGE in accordance with the agreements described in the preceding paragraph, are set forth in the following table:

	APS	SRP	Edison	PNM	EPE
Delivered	5,898,000	5,285,000	16,780,000	1,555,000	—0—
Received	795,000	2,216,000	—0—	77,894,000	2,207,000

In 1975, TGE also delivered 45,491,000 kwh to, and received 38,546,000 kwh from the United States Bureau of Reclamation.

The Electrical Energy Tax measured by the energy sold at wholesale after July 1, 1975, is passed on by each plain-

tiff in whole or in part to the wholesale purchaser. Where the eventual wholesale purchaser is a "person selling the electricity for consumption in New Mexico," § 9C of the Electrical Energy Tax Act requires the purchaser to reimburse the wholesaler for the amount of the credit accorded the ultimate retailer by § 9B, and § 9C also requires that such credit be assigned by the wholesaler to its purchaser. Regulations issued under those provisions require each generating wholesaler to assign a "potential credit" equal to the Electrical Energy Tax to his wholesale purchaser, who is entitled to an actual credit against the gross receipts tax if the electrical energy is sold "for consumption in New Mexico."

13. On September 25, 1975, TGE timely filed with defendant a return (Form EE-1) showing that for July, 1975, energy generated by TGE in New Mexico was 145,206,000 kwh, and the amount due under the Electrical Energy Tax for such period was \$58,082.40. The amount of tax shown on the returns was duly protested without payment in accordance with § 72-13-38 N.M.S.A., 1953. The Tax for subsequent months has been similarly returned and the unpaid portion has been timely protested by TGE.

14. TGE is subject to the following Arizona taxes and in 1975 became liable for the amounts shown.

<u>Corporate Income</u>	<u>Unemployment</u>	<u>State Sales</u>	<u>City Sales</u>	<u>State Use</u>
\$308,000 (Est)	\$48,626	\$6,087,885	\$1,533,706	\$132,982
<u>City Use</u>	<u>Ad Valorem</u>	<u>City Franchise</u>	<u>Excise and Other</u>	
—0—	\$17,401,907	\$1,675,724	\$356,229	
TOTAL: \$27,545,059				

Similar liabilities apply for 1976 and are reasonably expected for later years.

Electrical energy generated in New Mexico, in respect of which the Electrical Energy Tax is payable, is sold by

SUBSCRIBED AND SWORN to before me this 14th day of September, 1976.

My commission expires:
February 1, 1978.

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Plaintiffs,*

FRED O'CHESKEY, ET AL., *Defendants.*

AFFIDAVIT No. 6
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW MEXICO)
) SS:
COUNTY OF SANTA FE)

PHOEBE FORNACIARI, being first duly sworn upon her oath, deposes and says:

1. That affiant is employed by the law firm of MONTGOMERY, FEDERICI, ANDREWS & HANNAHS as a paralegal assistant and was so employed during the time that the 1st Session of the 32nd Legislature of New Mexico considered the bill and substitute bills which, upon enactment and approval of the Governor, became Laws 1975, Chapter 263; to-wit: January through March, 1975.

2. That during the aforesaid period, either the affiant or a member of the law firm attended all Senate and House Committee and floor sessions at which such bills were formally considered and a member of the law firm tape recorded these discussions and debate concerning said bills; that all Senate and House Committee and floor sessions were attended by the affiant, with the exception of the ses-

sion on the Senate floor on March 11, 1975, which was attended by another member of the law firm.

3. That attached hereto are transcripts of the aforesaid tape recordings, which affiant has reviewed and compared with the tape recordings made by affiant or another member of the law firm and the attached transcripts are true and correct transcriptions of the tape recordings of such discussions and debates.

4. That attached hereto as Exhibits 1, 2 and 3 are true and correct copies of the bills and substitute bills considered during the 1st Session of the 32nd Legislature and which resulted, upon enactment and approved, in Laws 1975, Chapter 263, to-wit:

Exhibit 1 to Affidavit No. 6: Senate Bill 258;

Exhibit 2 to Affidavit No. 6: Senate Corporations Committee Substitute for Senate Bill 258; and

Exhibit 3 to Affidavit No. 6: Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258.

5. That as more fully appears from the Exhibits and transcripts attached hereto:

In the first hearing on the bill (S.B. 258) before the Senate Corporations Committee on February 27, 1975, Senator Aubrey Dunn, the sponsor of the bill, introduced the Commissioner of Revenue to explain the operation and effect of the bill. The Commissioner described the way in which the energy tax would be credited against the gross receipts tax applicable to a New Mexico sale of the energy and concluded, "The taxpayer in California or the consumer in California would bear the brunt of the tax." Before the Senate Finance Committee on March 5, 1975, Senator Dunn stated that "there will be very little possibility of any of this being passed on to the New Mexico consumer," and the Commissioner of Revenue stated that the tax was "really

on exported power." On the Senate floor on March 11, 1975, Senator Dunn explained the bill as follows:

[A]nd the idea behind it, Mr. President, is that we levy this generating tax and we allow the generating companies to take credit for the gross receipts tax which they collect on this power as they sell it, against this particular amount of generation tax. When this is done, Mr. President, it forms a washout which allows that most of the tax could be passed on in almost 99.9 per cent of the time to the residents of Arizona and California."

In the House, Senator Dunn described the intent of the Senate-passed bill to the Taxation and Revenue Committee on March 19, 1975, as follows:

"Mr. Chairman, the main idea behind this is that the generator who is responsible for this tax may apply against that tax the gross receipts which he collects. Mr. Chairman, I think this is a very important part of it. And in almost one hundred per cent, but not in every case, I'd hasten to say that there would be hardly any taxation on the individual consumer in the State of New Mexico, in this particular area."

Senator Dunn later stated at the same hearing that "a very, very large percentage of it—almost a hundred per cent, in my estimation—will be passed on and can be passed on to Arizona and California" and that "this particular tax was for the consumer, Mr. Chairman, for the consumer in Arizona and for the consumer in California." On the House floor, the bill was sponsored by Representative Edward J. Lopez, Chairman of the Taxation and Revenue Committee. Representative Lopez explained his sponsorship of the bill as follows:

"I find myself in the unique position this year, Mr. Speaker, of having to support a measure of this nature.

As you all know, for the last four years, I've stood up in opposition to the imposition of this sort of tax. But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state residents with no additional burden on our New Mexico residents. So, for that reason I stand before you today supporting this bill and carrying it."

The House thereupon passed the bill.

Further affiant sayeth not.

/s/ PHEOBE FORNACIERI
Pheobe Fornacieri

SUBSCRIBED AND SWORN to before me this 8th day of September, 1976.

/s/ VIRGINIA C. THOMPSON
Notary Public

My Commission Expires:

September 11, 1979

(SEAL)

Affidavit of Carl M. Turner
(Affidavit No. 7 to Plaintiffs' Motion for Summary Judgement)
(Without Exhibits)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Plaintiffs,*

VS.

FRED O'CHESKEY, ET AL., *Defendants.*

AFFIDAVIT OF CARL M. TURNER

STATE OF NEW MEXICO)
) ss
COUNTY OF SANTA FE)

CARL M. TURNER, being first duly sworn upon his oath, deposes and says:

1. Affiant is employed by the New Mexico Rural Electrification Cooperation Association as executive manager and was so employed during the time that the 1st Session of the 32nd Legislature of New Mexico considered the bill and substitute bills which, upon enactment and approval of the Governor, became Laws 1975, Chapter 263, to-wit: January through March, 1975. During the aforesaid period, affiant attended all Senate and House Committee and floor sessions at which such bills were formally considered.

2. Attached hereto as Exhibits 1, 2, 3 and 4 are true and correct copies of the following documents distributed by the Commissioner of Revenue to members of the Legislature in connection with said bills, to-wit:

Exhibit 1: Bill Review Report dated February 24, 1975 concerning Senate Bill 258;

Exhibit 2: Bill Review Report dated February 26, 1975 concerning Senate Corporations Committee Substitute for Senate Bill 258;

Exhibit 3: Bill Review Report dated March 10, 1975 concerning Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258; and

Exhibit 4: Memorandum to Senator Aubrey Dunn dated March 10, 1975 concerning Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258.

3. Before Senate Finance Committee Substitute for Senate Corporations Committee Substitute for Senate Bill 258 was brought to the Senate floor, the Commissioner of Revenue recommended that the tax rate be reduced from five tenths of a mill to four tenths of a mill per kilowatt hour to avoid imposition of any part of the tax on energy consumed in New Mexico. In a memorandum dated March 10, 1975, to Senator Dunn, the Commissioner stated:

"If the generating utility sells to other utilities in the state, the generation tax can be assigned along the route with the buyer reimbursing the utility generating the electricity for the generation tax. The ultimate retailer of the electricity can credit the generation tax against the gross receipts tax.

"Under the generation tax rate of 1/2 mill per/KWH, of all the utilities in New Mexico, it appeared that only Southwestern Public Service Company might have to pass some generation tax on to New Mexico consumers. It appears that the amendment to 4/10 of a mill brings down the generation tax so that even in Southwestern's case the gross receipts tax more than offsets the generation tax."

The tax rate was thus reduced before the bill was passed by the Senate.

/s/ CARL M. TURNER
Carl M. Turner

SUBSCRIBED AND SWORN to before me this 10th day of September, 1976.

/s/ ROSEMARIE MCCURRY
Notary Public

My commission expires: 2-8-77

Plaintiffs' Answers to Supplemental Interrogatory No. 9

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

PLAINTIFFS' ANSWERS TO SUPPLEMENTAL INTERROGATORIES

Defendants, ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY and TUCSON GAS & ELECTRIC COMPANY, pursuant to Rule 33 of the Rules of Civil Procedure, hereby answer Defendants' Supplemental Interrogatories, dated October 6, 1976.

• • • • •

9. With respect to the taxes paid to states other than New Mexico, as set forth in the affidavits in support of Plaintiffs' Motion for Summary Judgment, please state what of each tax is attributable to electricity generated in New Mexico, and please explain how it relates to such electricity.

(A) ARIZONA PUBLIC SERVICE COMPANY (APS)

Type of Arizona Tax	Total	Arizona Tax	
		Attributable to New Mexico Generation	
		Amount	Percentage
State Sales	\$12,315,992	\$4,077,617	33.11%
City Sales	1,193,116	391,289	32.80%
City Franchise	3,629,957	1,180,596	32.52%
Corporation Commission			
Regulatory Assessment	497,773	162,262	32.60%
Income	1,515,687	516,089	34.05%

The above taxes are revenue related and are directly related to electricity generated in New Mexico. A portion of Arizona ad valorem, payroll, etc., taxes which relate to the transmission and/or distribution of electricity is also attributable to New Mexico generation, but have not been apportioned at this time.

(B) EL PASO ELECTRIC COMPANY (EL PASO)

The nature of an interconnected transmission and generation system makes it impossible to specify the origin of electric energy consumed throughout the system. For this reason, the Company compared its New Mexico generation to its New Mexico consumption and arrived at a net excess generation of 902,843 MWH. It was assumed that this excess generation was absorbed by the Company's Texas load, and the appropriate percentage of gross receipts taxes paid in Texas was attributed to the excess generation in New Mexico.

Theoretically, a portion of the Texas ad valorem taxes is attributable to New Mexico generation, but the data necessary to make such a determination is not available.

Total Generated in New Mexico
and Sold Outside New Mexico in 1975 • 930,340 MWH

Less: Sales to Other Utilities: (1)

APS	6,524
TG&E	2,207
SRP	<u>18,766</u>

Total Generated in New Mexico;
Sold in Texas & Mexico in 1975 902,843 (MWH)

Total Sales in Texas for 1975
(Includes Sales to R.G. Co-op. &
Republic of Mexico (2) 2,582,075 (MWH)

$902,843 \div 2,582,075 = 34.97\%$ (% of Texas Sales that are
generated in New Mexico)

1975 Gross Receipts Tax Paid to Texas \$1,139,942.88
× 34.97%

Texas Gross Receipts Tax Attributable
To Generation in New Mexico \$ 398,638.03

* Is comprised principally of electricity for Company's customers
in Texas, and for International Export to Republic of Mexico;
also included are amount sold to other utilities, delivered at Four
Corners, New Mexico for ultimate consumption outside of New
Mexico. (TAKEN FROM INTERROGATORY NO. 5, DOCKET
NO. 50245)

(1) Taken from El Paso's 1975 Annual Report to the Federal
Power Commission, Page 424.

(2) Taken from El Paso's 1975 Annual Report to the Federal
Power Commission, Pages 410 and 411 for total Texas sales
and Pages 412 and 413 for Sales for Resale (excluding CPS).

(C) SALT RIVER PROJECT (SRP)

The Arizona taxes paid by Salt River Project in Arizona
which are attributable to electricity generated in New Mex-
ico consist of 12.4% of the State and City Sales Taxes as

set forth in SRP's affidavit in support of plaintiff's Motion
for Summary Judgment.

(D) SOUTHERN CALIFORNIA EDISON COMPANY (SCE)

The percentages of 1975 taxes paid by SCE in states
other than New Mexico, attributable to electricity gener-
ated in New Mexico, are estimated as indicated below:

1. *California* (Southern California Edison Company, Affi- davit Item 15)

A. Franchise Requirements

1. Based on Revenues—.0569%*
2. Based on Other than Revenues (Miles of line, etc.)
—None

B. Corporate Income—.0569%*

C. Unemployment—None

D. Use—None

E. Ad Valorem—None

F. Excise (Gasoline, etc.)—None

G. Utility User's—.0569%*

2. *Arizona* (Southern California Edison Company, Affi- davit Item 14)

A. Corporate Income—.0569%*

B. Unemployment—None

C. State Use—None

D. Ad Valorem—None

$$* \text{Equals ratio of } \frac{3,134,110,000}{55,123,835,000} = .0569$$

(E) TUCSON GAS & ELECTRIC COMPANY (TG&E)
*Ratio of New Mexico Net Generation
to Total System Net Generation—1975*

New Mexico Net Generation (in kwh):

Four Corners	456,998,000*
San Juan	1,216,590,000*
Total New Mexico	<u>1,673,588,000</u>

New Mexico Net Generation	1,673,588,000	
System Net Generation	3,903,923,186**	<u>= 42.87%</u>

* FPC Form 1 (12-31-75), Page 432a, Line 12

** FPC Form 1 (12-31-75), Page 431, Line 9

1975 Arizona Taxes
Allocated to New Mexico Generation

	Electric	Gas	Total
State Sales Tax	\$5,003,346	\$1,084,539	\$6,087,885
New Mexico Generation Ratio	.4287		
	<u>\$2,144,934</u>		
	<u>\$2,144,934</u>		<u>= 35.23% of State Sales Tax</u>
	\$6,087,885		
City Sales Tax	\$1,215,070	\$ 318,636	\$1,533,706
New Mexico Generation Ratio	.4287		
	<u>\$ 520,901</u>		
	<u>\$520,901</u>		<u>= 33.96% of City Sales Tax</u>
	\$1,533,706		
City Franchise Tax	\$1,327,497	\$ 348,227	\$1,675,724
New Mexico Generation Ratio	.4287		
	<u>\$ 569,098</u>		
	<u>\$569,098</u>		<u>= 33.96% of City Franchise Tax</u>
	\$1,675,724		
Arizona Corporation			
Commission Assessment	\$ 214,541	\$ 43,031	\$ 257,672
New Mexico Generation Ratio	.4287		
	<u>\$ 92,017</u>		
	<u>\$92,017</u>		<u>= 35.71% of ACC Assessment</u>
	\$257,672		
State Income Tax (est.)	\$ 254,685	\$ 53,315	\$ 308,000
New Mexico Generation Ratio	.4287		
	<u>\$ 109,183</u>		
	<u>\$109,183</u>		<u>= 35.45% of State Income Tax</u>
	\$308,000		

DATED this 22nd day of October, 1976.

BIGBEE, STEPHENSON, CARPENTER &
CROUT

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/s/ By BRUCE NORTON

Attorneys for Plaintiffs

(Certificate of Mailing Omitted in Printing)

(Verification Omitted in Printing)

(Verification Omitted in Printing)

(Verification Omitted in Printing)

Office Memorandum

SNELL & WILMER

Office Memorandum

To: Bruce Norton

FROM: Bud Jacobson

DATE: June 4, 1976

SUBJECT: New Mexico Generation Tax

Senator Paul Fannin believes he has the support now to get a bill through the Senate correcting the New Mexico tax situation. He very much wants the language of the Amendment to be reviewed by an expert to make sure that in fact it does the job. I gather the language was drafted by a man in Senator Fannin's office named Bob Cable.

I talked with Senator Fannin Friday afternoon and told him you would be in Washington Monday and Tuesday, arriving mid-afternoon Monday at the Watergate. He asked that I get you a copy of the proposed language [copy attached] so you could study it before you get to Washington, making what changes you believe are in order.

NEXT HE ASKED THAT I BE SURE AND HAVE YOU CALL HIM AS SOON AS YOU ARRIVE MONDAY AFTERNOON AND ASK FOR HIM OR GORDON GILMAN. Mr. Cable, in his office, will not be back till Tuesday, BUT SENATOR FANNIN WANTS YOU TO ASK FOR HIM FIRST.

My own impression is that the language is a disaster! Subsection (a) appears to prohibit a tax on interstate commerce, while New Mexico claims they are only taxing the local activity of generating energy in New Mexico, and, therefore, interstate commerce, claimed they, is not involved. Should the Court hold they are right, that this is a local activity, it would be untouched by this legislation.

Next, the Act talks of a higher rate, while my memory is that the retail rate in New Mexico for the local sale of energy is the same as the rate imposed on that shipped to Arizona.

You are the expert on this, and I am going only from memory.

Success and thank you.

Correspondence to Senator Fannin

LAW OFFICES
SNELL & WILMER

June 10, 1976

The Honorable Paul J. Fannin
United States Senator
3121 Dirksen Senate Building
Washington, D.C. 20510

Dear Senator Fannin:

On the way back from Washington and while here, I have reviewed in much greater detail the proposed Amendment to Section 1322. I am enclosing what we consider to be far better language.

The first sentence should read as follows:

SEC. 201

(a) No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out of state manufacturers, producers, wholesalers, retailers or consumers of that electricity.

Upon reflection, this change is critical. Without it, the State of New Mexico will simply make the argument that Section 201(a) does nothing but prohibit taxes on interstate commerce, the very argument they are making in Court today on the challenge to the generation tax. The old language is susceptible to the interpretation that the New Mexico generation tax is imposed upon the local event of generation and not upon the "generation of electricity for transmission in interstate commerce". If there is any way in which the language can be changed to the above, it should be done.

The Honorable Paul J. Fannin -2- June 10, 1976

We have also changed the second sentence to read as follows:

For purposes of this section a tax is discriminatory that results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

While this change is not as critical as the change in the first sentence, we do think that you might have difficulty with Senator Byrd with the old language. After reading carefully the West Virginia Statute and the case of *Virginia Electric and Power Company v. Haden*, 200 S.E. 2d 848 (W. Va., 1973), it is our opinion that with the phrase "gross or net" included, Virginia consumers, or out-of-state producers of electricity operating in West Virginia, could well argue that this bill prohibits West Virginia's tax. With the language as we have changed it, we do not feel that that argument will be available to them.

It is my understanding that the language has already come out of the Committee, and, therefore, the above changes may be difficult to make. However, Senator Byrd might well be of assistance in that respect in light of the above.

Finally, it is imperative that a clear legislative history be made. Without it, we could probably dream up another dozen arguments that it does not apply to the generation tax in New Mexico. None of them would withstand a good legislative history, however. We think the legislative history should include that the language in the second sentence is intended to include the New Mexico generation tax specifically.

Thank you for your continued cooperation in this matter and our continued best wishes.

Very truly yours,

/s/ BRUCE NORTON
Bruce Norton

BN:ed

Enclosure

Order

SANTA FE COUNTY
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, et al., *Plaintiffs*,

vs.

FRED O'CHESKEY, et al., *Defendants*.**ORDER**

This matter having come on upon the oral stipulation of the parties in open court that leave may be granted to plaintiffs to file their First Amended Complaint and the Court having granted such leave in open court;

IT IS HEREBY ORDERED that plaintiffs be, and hereby are, granted leave to file their First Amended Complaint forthwith;

IT IS FURTHER ORDERED that defendants have, and hereby are granted, until November 5, 1976 to respond to such First Amended Complaint.

/s/ EDWIN L. FELTER
Edwin L. Felter
District Judge

First Amended Complaint

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, and STATE OF NEW MEXICO, *Defendants*.

FIRST AMENDED COMPLAINT

Plaintiffs bring this action for declaratory judgment pursuant to the New Mexico Declaratory Judgment Act, Chapter 340, Laws 1975, with respect to the constitutionality and validity of the Electrical Energy Tax Act, Chapter 263, Laws 1975, and for their First Amended Complaint herein, state:

1. Arizona Public Service Company, an Arizona corporation, generates, transmits, distributes, and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

2. El Paso Electric Company, a Texas corporation, generates, transmits, distributes and sells electrical energy within the States of New Mexico and Texas, and is regulated as a public utility in New Mexico by the New Mexico Public Service Commission and in Texas by the cities of El Paso, Van Horn, Anthony and Clint.

3. Salt River Project Agricultural Improvement and Power District (hereinafter "Salt River Project"), a political subdivision of the State of Arizona, operating a federal reclamation project pursuant to contracts with the Secretary of the Interior, generates, transmits, distributes and sells electrical energy within the State of Arizona.

4. Southern California Edison Company, a California corporation, generates, transmits, distributes and sells electrical energy within the State of California, and is regulated as a public utility by the California Public Utilities Commission.

5. Tucson Gas & Electric Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

6. Fred O'Cheskey is Commissioner of the Bureau of Revenue of the State of New Mexico. The Bureau of Revenue is the agency of state government charged with the administration and enforcement of the Electrical Energy Tax Act.

7. The Four Corners Power Plant is an electrical generating station composed of five generating units and related facilities located on Indian lands leased from the Navajo Nation under Leases dated December 1, 1960 and July 1, 1966, duly approved by the Navajo Tribal Council and the Acting Secretary of the Interior.

8. Arizona Public Service Company owns and operates generating units Nos. 1, 2 and 3 at the Four Corners Power Plant. Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Southern California Edison Company and Tucson Gas & Electric Company each owns an undivided interest in generating units Nos. 4 and 5 at the Four Corners Power Plant.

9. The San Juan Generating Station is an electrical generating station composed of two generating units (one operational and one under construction) and related facilities located in San Juan County, near Waterflow, New Mexico.

10. Public Service Company of New Mexico and Tucson Gas & Electric Company each owns an undivided one-half ($\frac{1}{2}$) interest in the San Juan Generating Station.

11. The Rio Grande Generating Station is an electrical generating station composed of eight generating units and related facilities located in Dona Ana County, near Anapra, New Mexico and is wholly owned by El Paso Electric Company.

12. Certain of the plaintiffs (Arizona Public Service Company and El Paso Electric Company) sell electrical energy generated in New Mexico to a foreign country, Mexico.

13. As shown on the Map of Principal Transmission Lines annexed hereto as Exhibit "A", the electrical system of each plaintiff is directly interconnected with the system of each other plaintiff and with the electrical systems of Public Service Company of New Mexico, the U.S. Bureau of Reclamation, and Utah Power and Light Company. Southern California Edison Company's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnected transmission lines thus constitute an interstate grid encompassing the West.

14. As a consequence of the system interconnections described in the preceding paragraph, the demand for

electricity in the major urban centers served by the plaintiffs in Arizona, southern California, and the El Paso area of west Texas determines in substantial degree the amount of electrical energy generated at generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand to which each plaintiff is entitled from its generation facilities is instantaneously transmitted over existing transmission lines to that plaintiff's service area.

15. All of the plaintiffs' above-described transactions in the generation and transmission of electrical energy at the Four Corners Power Plant, San Juan Generating Station, and the Rio Grande Generating Station, and the distribution and sales of such electrical energy, are in the course of commerce among the States and the Navajo Tribe of Indians, except for the aforesaid sales of electrical energy to Mexico, certain relatively insignificant sales made by Arizona Public Service Company within New Mexico to Utah International, Inc., for operation of the Navajo Mine which provides the fuel for the Four Corners Power Plant, and for certain sales by El Paso Electric Company within its service area in the State of New Mexico. All other sales or exchanges of electrical energy in New Mexico by any plaintiff are wholesale sales to other electric utility companies on the interconnected systems in interstate commerce under the exclusive jurisdiction of the Federal Power Commission. Such interstate sales give rise to no New Mexico gross receipts tax liability under the New Mexico Gross Receipts and Compensating Tax Act.

16. Each plaintiff pays income, ad valorem, franchise and other taxes imposed by the State of New Mexico or its political subdivisions on it and other taxpayers similarly situated, and income, ad valorem, sales and use (or their equivalent), franchise, excise and other taxes imposed by the state of its incorporation on it and other taxpayers similarly situated.

17. Section 3 of the Electrical Energy Tax Act, Chapter 263, Laws 1975 (hereinafter the "Act"), purports to impose on persons generating electricity a privilege tax of four-tenths of one mill "on each net kilowatt hour of electricity generated in New Mexico" for the purpose of sale.

18. Subsection 9B of the Act provides that the electrical energy tax paid on electricity generated and consumed in New Mexico may be credited against the gross receipts tax due New Mexico. No credits of any type are provided with respect to the electrical energy tax imposed upon electricity generated in New Mexico, but transmitted and consumed outside New Mexico.

19. Subsection 9C of the Act directs that the credit for electrical energy tax paid on electricity generated and consumed in New Mexico shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and further requires the assignee of such credit to reimburse the assignor for the amount of the credit so assigned.

20. The practical operation and effect of Sections 3 and 9 of the Act is to tax the generation of electricity in New Mexico, but shifts the entire incidence of such tax to those who sell or consume that electricity outside New Mexico since the person generating and selling electricity for consumption in New Mexico receives either a credit (under Subsection 9B) against his gross receipts tax due New Mexico or a reimbursement (under Subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

21. Plaintiffs' retail sales of electrical energy transmitted from generating facilities in New Mexico to plaintiffs' respective service areas in Texas, Arizona and California are subject to certain taxes imposed by those states, or the political subdivisions thereof, or both. Such taxes are variously denominated as sales or other types of excise taxes,

but are uniformly imposed upon, or passed on to consumers of electricity in those states.

22. There is no provision of law in Texas, Arizona or California whereby any of the plaintiffs are entitled to any credit, offset or rebate for the electrical energy tax imposed on them by New Mexico.

23. Public Service Company of New Mexico, an electric public utility regulated by the New Mexico Public Service Commission, with respect to its share of electrical energy generated at the Four Corners Power Plant and the San Juan Generating Station, will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act due to the provisions of Subsections 9B and 9C of the Act permitting the amount of electrical energy tax paid to be assigned or credited against its gross receipts tax liability due the State of New Mexico.

24. El Paso Electric Company will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act with respect to the electrical energy generated in New Mexico and sold by it to consumers in New Mexico due to the provisions of Subsections 9B and 9C of the Act allowing the electrical energy tax to be credited against its New Mexico gross receipts tax liability. It will sustain additional tax liability, however, on that electrical energy generated by it in New Mexico and sold by it to consumers outside New Mexico. This additional tax liability places El Paso at a competitive disadvantage with New Mexico utilities with whom it competes.

25. Plains Electric Generation and Transmission Cooperative, a New Mexico corporation, generates electrical energy at its generating plant near Algodones, New Mexico, and transmits and sells electrical energy solely to New Mexico electric utilities which are its members; however, by reason of Subsections 9B and 9C of the Act, it will incur no additional tax burden due to the Electrical Energy Tax Act.

26. Plaintiffs are informed and believe, and therefore allege, that no additional tax liability under the Electrical Energy Tax Act is incurred by any other person (as defined in the Electrical Energy Tax Act) engaged in the same business as plaintiffs upon electrical energy generated and consumed in New Mexico, due to the availability of the crediting provisions provided for under Subsections 9B and 9C of the Act.

27. Plaintiffs are informed and believe, and therefore allege, that all, or virtually all, of the additional taxes claimed to be due under the Electrical Energy Tax Act, after application of Subsections 9B and 9C of the Act, will be borne by those persons, including plaintiffs, engaged in the generation of electricity in New Mexico which is transmitted across and consumed outside the boundaries of the State of New Mexico.

28. Plaintiffs are informed and believe, and therefore allege, that the Act was enacted for the purpose of and the view to placing the exclusive burden of paying additional tax revenues to the State of New Mexico upon transactions in commerce among the several states and with the Indian Tribes.

29. The language of the Act, coupled with the practical application of the tax, constitutes a tax on the privilege of engaging in commerce among the several states.

30. Plaintiffs contend that the Act is unconstitutional and void for each and every one of the following reasons:

A. The Electrical Energy Tax Act violates the Commerce Clause of Article I, Section 8 of the United States Constitution by deliberately and invidiously discriminating against and imposing direct and multiple burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity.

B. Application of the Electrical Energy Tax to these plaintiffs, measured by electricity generated in New

Mexico for transmission and sale in interstate commerce, is arbitrary, capricious and unreasonable and denies to each plaintiff the equal protection of the law, and the rights, privileges and immunities enjoyed by other members of the class defined as persons generating electrical energy in New Mexico, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18, and Article IV, Section 26 of the New Mexico Constitution.

C. The Act deprives plaintiffs of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

D. The Act violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constitution.

31. Plaintiffs are informed and believe, and therefore allege, that defendants contend the Act is constitutional with respect to the matters set forth in paragraph No. 29 of this Complaint.

32. The Tax Reform Act of 1976, duly passed by the United States Congress and approved and enacted by President Gerald R. Ford on October 4, 1976, prohibits the imposition or assessment of certain taxes upon the generation or transmission of electricity:

TITLE II—DISCRIMINATION TAXES

Sec. 201. No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly,

in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

(b) Effective Date.—The amendment made by subsection (a) shall take effect beginning June 30, 1974.

33. Plaintiffs contend that the Act is rendered illegal, invalid, inoperative, and void from June 30, 1974, forward, by the terms and provisions of Tax Reform Act of 1976, Section 201.

34. Plaintiffs are informed and believe, and therefore allege, that defendants contend that the Act is not illegal, invalid, inoperative, or void from June 30, 1974, forward, as set forth in Paragraph 32 of this Complaint.

35. The plaintiffs, being persons whose rights, status or other legal relations are affected by the Act, request that the Court determine the questions of validity arising under the Act.

36. A genuine controversy exists between the plaintiffs and defendants with respect to the matters hereinbefore alleged; however, there is no controversy respecting the amount of the tax which would be payable by any plaintiff, if the Act is valid, nor with respect to the form or accuracy of any assessment of the tax thereunder.

37. Due to the necessity to construe and apply provisions of the United States Constitution, the New Mexico Constitution, and the Tax Reform Act of 1976, in order to resolve the controversy between plaintiffs and defendants, plaintiffs have no other plain, speedy and adequate remedy.

38. All conditions precedent to the commencement and maintenance of this action have occurred or been met.

WHEREFORE, plaintiffs pray:

A. That this Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be unconstitutional and void.

B. That the Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be illegal, invalid, inoperative and void from June 30, 1974, forward, by the terms and provisions of Tax Reform Act of 1976, Section 201.

C. That upon final hearing and determination the defendants be enjoined from enforcing the Electrical Energy Tax Act and plaintiffs have such other and further relief as may be proper in the premises.

BIGBEE, STEPHENSON, CARPENTER
& CROUT

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Ben J. Phillips

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Santa Fe, New Mexico 87501

/s/ By: BRUCE NORTON

Bruce Norton

Attorneys for Plaintiffs

I, Richard N. Carpenter, being one of the counsel for plaintiffs herein, do hereby certify that I served a copy of the First Amended Complaint upon defendants herein by personally delivering a copy thereof to one of the attorneys of record for the defendants on this 22nd day of October, 1976.

/s/ RICHARD N. CARPENTER

Richard N. Carpenter

Plaintiffs' Supplemental Motion for Summary Judgment

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, and STATE OF NEW MEXICO, *Defendants*

**PLAINTIFFS' SUPPLEMENTAL
MOTION FOR SUMMARY JUDGMENT**

Come now the plaintiffs, by and through their attorneys undersigned, and, pursuant to Rule 56, N.M.R.C.P., move for summary judgment in their favor on all issues raised by the First Amended Complaint herein.

In support thereof, movants state that incorporated herein by reference are those supporting affidavits, being Affidavit Nos. 1-7, inclusive, attached to plaintiffs' original Motion for Summary Judgment and Affidavit No. 8 attached hereto, and that the pleadings and answers to interrogatories on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the movants are entitled to judgment as a matter of law.

WHEREFORE, plaintiffs pray that the Court enter its order rendering them summary judgment on the issues raised by their First Amended Complaint.

Respectfully submitted,

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& HANNAHS
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/s/ By BRUCE NORTON
Bruce Norton, Esq.

BIGBEE, STEPHENSON, CARPENTER
& CROUT
P. O. Box 669
Santa Fe, New Mexico 87501

/s/ By RICHARD N. CARPENTER
Richard Carpenter, Esq.

I hereby certify that I delivered in hand a copy of the foregoing pleading to opposing counsel of record this 5th day of November, 1976.

/s/ RICHARD N. CARPENTER
Richard N. Carpenter

Affidavit of Bruce Norton
(with Attachments A, B and C)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
 STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COM-
 PANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
 AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON
 COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Plaintiffs

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF
 REVENUE, and STATE OF NEW MEXICO, *Defendants*

STATE OF ARIZONA
 COUNTY OF MARICOPA, ss.

BRUCE NORTON, being first duly sworn, upon his oath,
 deposes and says:

1. That he is one of the attorneys for the plaintiffs in this action and that statements herein are made upon his personal knowledge and belief.
2. That attachment A to this affidavit is a true and correct reproduction of Section 1322 of the Tax Reform Act of 1976, as duly passed by the United States Congress and approved and enacted by President Gerald R. Ford on October 4, 1976, prohibiting the imposition or assessment of certain taxes upon the generation or transmission of electricity.
3. That attachment B to this affidavit is a true and correct reproduction of the Conference Report concerning Section 1322 of the Tax Reform Act of 1976.
4. That attachment C to this affidavit is a true and correct reproduction of the Senate Finance Committee Report on Section 1322 of the Tax Reform Act of 1976.

5. That attachment D to this affidavit is a true and correct reproduction of the Congressional Record—Senate, July 28, 1976, wherein a floor debate concerning Section 1322 of the Tax Reform Act of 1976 is set forth.

/s/ BRUCE NORTON
 Bruce Norton

SUBSCRIBED AND SWORN to before me this 3rd day of November, 1976.

/s/ SUSAN J. MILLER
 Susan J. Miller
 Notary Public

My Commission Expires Sept. 16, 1980

CONFERENCE REPORT LEGISLATIVE LANGUAGE
H.R. 10612
SENATE REPORT NO. 94-1236

Title II—Discriminatory Taxes

Sec. 201. No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

(b) Effective Date.—The amendment made by subsection (a) shall take effect beginning June 30, 1974.

CONFERENCE REPORT STATEMENT OF MANAGERS
H.R. 10612
SENATE REPORT NO. 94-1236

1322. Prohibition of Discriminatory State or Local Taxes
on Generation or Transmission of Electricity

House bill.—No provision.

Senate amendment.—Under present law, any restrictions on the power of States or their political subdivisions to tax goods or services produced in the taxing State for nondomiciliary use outside the taxing State are derived from court interpretations of the interstate commerce clause of the Constitution.

The Senate amendment prohibits any State or political subdivision of a State from directly or indirectly imposing any tax on the generation or transmission of electricity which discriminates against out-of-State users. This provision is effective for taxable years beginning after June 30, 1974.

Conference agreement.—The conference agreement follows the Senate amendment.

SENATE FINANCE COMM. REPORT NO. 94-938
H.R. 10612

23. Prohibition of Discriminatory State Taxes on Generation of Electricity (sec. 1323 of the amendment)

Present law

Federal statutes provide few limitations on the power of States to tax nondomiciliaries or to impose special taxes on goods or services produced in the taxing State for nondomiciliary use outside the taxing State.

However, Public Law 86-272¹ does establish certain minimum standards upon the power of a State to tax nondomiciliaries selling in the taxing State in interstate commerce. That Act did not affect the powers of States to tax goods or services produced within its boundaries for consumption outside its boundaries. Title II of the Act, however, also provided for further "studies of all matters pertaining to the taxation of interstate commerce. . . ."

Reasons for change

The committee has learned that one State places a discriminatory tax upon the production of electricity within

¹ 86th Cong., 1st Sess., 73 Stat. 555 (1959).

its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries. This credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State.¹ As a result, the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax. However, the cost to domiciliaries of the taxing State does not include the amount of the tax.

The committee believes that this is an example of discriminatory State taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce.

Explanation of provision

The committee amendment prohibits any State, or political subdivision of a State, from imposing a tax on or with respect to the generation of electricity for transmission in interstate commerce if the tax is discriminatory against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. A tax is considered discriminatory if it directly or indirectly results in the payment of a higher gross or net tax on electricity generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

This provision is not intended to prohibit, restrain, or burden any other State which currently imposes a nondiscriminatory tax on the generation of electricity.

¹ However, a credit for the amount of a tax on the production of electricity imposed by a second State is allowed against the first State's gross receipts tax if the electricity is consumed in the first State.

This provision replaces the current Title II of Public Law 86-272, which is the title calling for further congressional studies. A number of studies of the problem of multi-state taxation of interstate commerce have already been made by congressional committees, and the present Title II is not needed to authorize any additional studies that may be needed.

The House bill contains no similar provision.

Effective date

The prohibition of discriminatory taxes made by this amendment applies with respect to taxable years beginning after June 30, 1974.

Revenue effect

This provision will have no impact upon Federal revenues.

Answer to the First Amended Complaint

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, *et al.*, Plaintiffs,

vs.

FRED O'CHESKEY, *et al.*, Defendants.**ANSWER TO THE FIRST AMENDED COMPLAINT**

Defendants Fred O'Cheskey, the Bureau of Revenue and the State of New Mexico, for their answer to the first amended complaint, state as follows:

FIRST DEFENSE

The first amended complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The court lacks subject matter jurisdiction over this action because of § 72-13-36, N.M.S.A. 1953.

THIRD DEFENSE

The court's discretion to render a declaratory judgment should not be exercised as to this action.

FOURTH DEFENSE

Section 201 of the Tax Reform Act of 1976, referred to in paragraph 32 of the first amended complaint, violates the Constitution of the United States.

FIFTH DEFENSE

1. Defendants deny the allegations of paragraph 1 of the first amended complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. Defendants admit the allegations of paragraph 2, except that, for lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny that El Paso Electric Company is regulated as a public utility by the cities of El Paso, Van Horn, Anthony and Clint, Texas.

3. Defendants deny the allegations of paragraph 3 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

4. Defendants deny the allegations of paragraph 4 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

5. Defendants deny the allegations of paragraph 5 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

6. Defendants admit the allegations of paragraph 6.

7. Defendants deny the allegations of paragraph 7 for lack of knowledge or information sufficient to form a belief as to the truth thereof, except that Defendants admit that the Four Corners Power Plant is an electrical generating station composed of 5 generating units and related facilities.

8. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny the allegations of paragraph 8.

9. Defendants admit the allegations of paragraph 9.

10. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny the allegations of paragraph 10.

11. Defendants admit the allegations of paragraph 11.

12. Defendants deny the allegations of paragraph 12.

13. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Defendants deny the allegations of paragraph 13.

14. Defendants deny the allegations of paragraph 14.

15. Defendants deny the allegations of paragraph 15, in part for lack of knowledge or information sufficient to form a belief as to the truth thereof.

16. Defendants deny the allegations of paragraph 16 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

17. Defendants admit the allegations of paragraph 17.

18. In response to the allegations of paragraph 18, Defendants admit that the legislature of New Mexico enacted subsection 9B of the Act, to which reference is made for the correct text. Since paragraph 18 paraphrases subsection 9B, Defendants deny the allegations thereof.

19. In response to the allegations of paragraph 19, Defendants admit that the legislature of New Mexico enacted subsection 9C of the Act, to which reference is made for the correct text. Since paragraph 19 paraphrases subsection 9C, Defendants deny the allegations thereof.

20. Defendants deny the allegations of paragraph 20, except that they admit that a person generating and selling electricity for consumption in New Mexico is entitled to receive either a credit (under subsection 9B) against the gross receipts tax due New Mexico or a reimbursement (under subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

21. Defendants deny the allegations of paragraph 21 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

22. Defendants deny the allegations of paragraph 22 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

23. Defendants deny the allegations of paragraph 23 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

24. Defendants deny the allegations of paragraph 24 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

25. Defendants deny the allegations of paragraph 25 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

26. Defendants deny the allegations of paragraph 26 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

27. Defendants deny the allegations of paragraph 27 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

28. Defendants deny the allegations of paragraph 28.

29. Defendants deny the allegations of paragraph 29.

30. In response to the allegations of paragraph 30, Defendants admit that Plaintiffs make the legal contentions set forth therein, but deny that any of the contentions is correct.

31. Defendants admit the allegations of paragraph 31.

32. In response to the allegations of paragraph 32, Defendants admit that Section 201 of the Tax Reform Act of 1976 was enacted into law, and deny the remaining allegations for lack of knowledge or information sufficient to form a belief as to the truth thereof.

33. In response to the allegations of paragraph 33, Defendants admit that Plaintiffs make the legal contentions

set forth therein, but deny that any of the contentions is correct.

34. Defendants admit the allegations of paragraph 34.

35. Paragraph 35 sets forth no factual allegations and therefore requires no response.

36. Defendants deny the allegations of paragraph 36.

37. Defendants deny the allegations of paragraph 37.

38. Defendants deny the allegations of paragraph 38.

WHEREFORE, Defendants pray that they have judgment dismissing the first amended complaint, that they recover their costs herein expended and that they have such further relief as the court deems proper.

/s/ JAN UNNA
Jan Unna
Bureau of Revenue
Assistant Attorney General

/s/ DANIEL FRIEDMAN
Daniel Friedman
Bureau of Revenue
Assistant Attorney General

(Certificate of Service omitted in printing)

Defendants' Motion for Summary Judgement

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, *et al.*, Plaintiffs,

vs.

FRED O'CHESKEY, *et al.*, Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Rules of Civil Procedure, Defendants move this Court to enter a summary judgment in Defendants' favor on all issues raised by the First Amended Complaint on the grounds that there is no genuine issue as to any material fact and that Defendants are entitled to such judgment as a matter of law. In support of this motion there are attached hereto the following affidavits:

A. Martin Boughman
B. Graciela Olivarez
C. Cubia Clayton
D. Dan Croy
E. Bruce Nicholson
F. Stephen R. Flance
G. Lee Wilson

Respectfully submitted,

/s/ JAN UNNA
Jan Unna

/s/ DANIEL FRIEDMAN
Daniel Friedman
Attorneys for Defendants
Post Office Box 630
Santa Fe, New Mexico 87503
(505) 827-3221

(Certificate of Service omitted in printing)

Affidavit of Martin L. Baughman

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50425

ARIZONA PUBLIC SERVICE COMPANY, *et al.*, *Plaintiffs*,*vs.*FRED O'CHESKEY, *et al.*, *Defendant*.**AFFIDAVIT OF MARTIN L. BAUGHMAN**

Martin L. Baughman, being duly sworn, deposes and says:

1. I am an assistant professor of electrical engineering at the University of Texas in Austin, Texas. My curriculum vitae is attached hereto as Exhibit A. I have extensive training and research experience relating to the mechanics and economics of power generation and transmission as conducted by large utilities in the United States. I am qualified and regarded as an expert in regard to these subjects.

2. The statements in this affidavit and in the exhibit which is attached hereto as Exhibit B are based upon my personal experience, research, and belief and are true to the best of my knowledge. Included in this research are inspections of the Four Corners and San Juan generating plants conducted by me in October, 1976.

3. My conclusions, as set forth and documented more extensively in Exhibit B, are as follows:

a. The generation of electricity is an event which is local to the place in which it occurs and which is separable both mechanically and economically from the transmission and distribution of electricity.

b. The functions and overall purposes of an electric power system and the basic processes of generation, trans-

mission and distribution of electricity have not changed since the early 1900's.

c. The generation of electricity in New Mexico for export to out of state consumers is a growing phenomenon. In 1975 over 60% of the electricity generated in New Mexico was exported. The percentage of exported electricity is considerably higher from the Four Corners and San Juan generating plants in which the Plaintiffs in this action own significant interests. Some 80% of the electricity generated in these plants is exported by the Plaintiffs.

d. In generating electricity in New Mexico for export, the out of state utilities take advantage of the availability of low cost coal resources existing in New Mexico and the economics of high voltage transmission to obtain low cost electrical energy for their consumers. Without the low cost electricity exported from New Mexico, the Plaintiffs would have to increase their reliance on generating plants incurring significantly higher fuel costs. If New Mexico electricity were unavailable to the Plaintiffs, and they had to generate the equivalent amount of electricity at their plants outside New Mexico, their costs would increase by a minimum of one hundred and twenty four million dollars a year.

e. The process of generation in New Mexico accounts for 25% of the Plaintiffs' delivered costs relative to electricity exported from New Mexico. Taxes paid to all collecting jurisdictions in New Mexico account for 7% of the cost of generation, excluding the Electrical Energy Tax Act. Inclusion of the electrical energy tax would raise the taxes paid to all collecting jurisdictions in New Mexico to a maximum 12% of the cost of generation. This compares favorably with the rate of taxes paid by Plaintiffs to all taxing jurisdictions within and without New Mexico on their total revenues from generating, transmitting and distributing electricity, which averages 15% of the total cost experienced by the Plaintiffs. Thus, in proportion to the value of the services performed in the state, New Mexico has re-

ceived less in taxes than other governmental jurisdictions, and collection of the electrical energy tax will only partially correct the disparity.

f. Expressed as a percentage of the average retail price of the electricity generated by Plaintiffs in New Mexico, the Electrical Energy Tax is imposed at a rate of less than two percent.

/s/ MARTIN L. BAUGHMAN
Martin L. Baughman

Subscribed and sworn to before me this 7th day of December, 1976.

/s/ ELLEN MITCHELL
Notary Public

My Commission Expires:

June 1, 1977

Affidavit of Graciela Olivarez

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants.*

STATE OF NEW MEXICO, COUNTY OF SANTA FE, ss.

GRACIELA OLIVAREZ, being first duly sworn, upon her oath, deposes and says:

1. That she is the State Planning Officer, State of New Mexico, and as such she is authorized to make this Affidavit, and that statements herein are made upon her personal knowledge and belief.

2. The defendants in this proceeding are Fred O'Cheskey, Commissioner of Revenue, Bureau of Revenue, and State of New Mexico.

3. The State Planning Office is an Executive Office of the State of New Mexico.

4. Energy development in the Four Corners area of New Mexico incurs significant negative environmental and social impacts on the area. The burden of alleviating these impacts result in significant costs. These costs are legitimate and they must be paid.

5. From all social and economic indicators, the northwest corner of New Mexico is experiencing rapid economic and population growth. The capacity of the public sector to provide adequate facilities and services is being severely

strained. Potential exists that "boom" conditions may quickly become evident.

6. Negative results of this rapid growth are evident in the deterioration of environmental quality, social problems, and general lowering of the quality of life.

7. At the same time, energy consumers in Arizona, California, and Texas enjoy the benefits of clean and relatively cheap electricity transmitted from generating facilities in San Juan County, New Mexico.

8. Particulate and other emissions from powerplants are degrading New Mexico's clean air and costing us several million dollars per year.

9. Loss of visibility is impairing the aesthetic quality of major landmarks in the area. Coal stripmining is carried on while reclamation techniques remain uncertain. There is no assurance that the thousands of acres mined can ever be revegetated due to limited precipitation in the mining area. This potential inability to reclaim the land will further contribute to the negative visual impact and to particulate pollution of the air.

10. The State also sustains a loss of water quality. Utilization of increasing amounts of water from the San Juan River could increase the salinity of the river. Return water from sewage treatment plants, septic systems, and industrial activity contribute to contamination of water quality in the San Juan River.

11. Industrialization of northwest New Mexico is creating jobs, many of which will be filled by persons attracted to the area by the promise of employment. Rapid population growth creates a demand for services and facilities which quickly outstrips a community's ability to respond. For example, water and sewer systems in the Communities of Farmington, Bloomfield, and Aztec are operating at or near capacity. Needed State and Federal access roads, serving San Juan County, require major expansion and up-

grading. Housing shortages have reached a critical level. The incidence of serious crime such as homicide and aggravated assault was well above the State average in 1974 and 1975. As noted in the State Plan for Mental Health Services, 19766-77, a rise in social and mental health problems can be anticipated in the area.

12. To mitigate the negative impacts of rapid growth, the public sector must have adequate tax revenues to insure environmental quality and provide community infrastructure and services. However, the State of New Mexico is not in a position to shoulder the total burden of these costs; nor should it be the State's unique responsibility.

Industries and consumers that benefit from resource exploitation in the Four Corners area must also be prepared to help offset the negative costs of growth impacts.

/s/ GRACIELA OLIVAREZ
Graciela Olivarez

SUBSCRIBED AND SWORN to before me this 23rd day of November, 1976.

/s/ PATRICIA D. SANCHEZ
Patricia D. Sanchez

My commission expires:

November 10, 1978

Affidavit of Cubia L. Clayton

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50425

ARIZONA PUBLIC SERVICE COMPANY, *et al.*, Plaintiffs,*vs.*

FRED O'CHESKEY, Defendant.

AFFIDAVIT OF CUBIA L. CLAYTON

I, Cubia L. Clayton being duly sworn state:

(1) I am Deputy Director of the New Mexico Environmental Improvement Agency. I have been employed by the New Mexico Environmental Improvement Agency since April of 1971 in various capacities including Environmental Scientist III, Program Manager for Regulation and Standards Development and Division Chief of the Air Quality Control Division. Prior to 1971, I was employed by the City of Albuquerque, Environmental Health Department, for eight years and the University of Minnesota, University Health Services, for a year and a half. I have a Bachelor of Science degree with a major in Biology from the New Mexico State University and a Masters of Public Health with a major in Environmental Sciences from the University of Minnesota.*

(2) The air pollution caused by electric power generation at the Four Corners and San Juan plants has had a significantly adverse impact on visibility in the Four Corners area of New Mexico. New Mexico vistas historically

* The statements made here are based on my experience, knowledge and belief and are supported by and referenced in an affidavit submitted separately by Lee Wilson.

have been known for their depth, clarity and color quality, particularly in the northern part of the state. These exceptional vistas have been important in the quality of life enjoyed by New Mexicans and in the promotion of tourism and movie production for the state. Emissions of particulates, sulfur dioxide, and oxides of nitrogen from the San Juan County power plants, primarily the Four Corners generating station at present amount to approximately one quarter billion pounds per year, and have been greater in the past. These emissions have resulted in reduced visual range, less atmospheric clarity, increased frequency of hazy conditions. Studies conducted at New Mexico State University have shown that the reduced visibility represents a cost borne by citizens and visitors in the impacted area. This cost is conservatively estimated to exceed five million dollars per year from the Four Corners generating station alone.

(3) There is the possibility that significant long-term health hazards could occur as the result of air pollution from coal-fired power plants, even though air quality near the plants may meet existing air quality standards. This is so because of the fact that present standards do not address the effect of many pollutants, including toxic or cancer-causing substances such as heavy metals and radioactive materials. Neither do the standards reflect possible interactive (synergistic) effects of different contaminants, nor that the uncontrolled emissions from a power plant are dominantly fine particles which may be relatively enriched in hazardous substances. Health problems resulting from long-term, low-level exposure to such substances may not appear for many years.

An additional factor is the comparatively large number of New Mexico residents who are sensitive to air pollution. Further, the high altitude of the state may exaggerate health impacts because of decreased oxygen supplies. Under such conditions, prolonged exposure of sensitive individuals

to pollutants in concentrations lower than the standards could be deleterious to public health. A significant portion of the burden of investigating such potential health effects, and of remedying them should they occur, falls upon state government.

(4) Strip-mines and transmission corridors significantly impact the aesthetic quality of northwestern New Mexico. These impacts could involve an environmental cost valued at more than seven million dollars per year. The mining impact is total on a local, short-term basis; because of climate, soils and other factors complete recovery of the landscape may require decades or centuries. The impact of transmission lines is most noticeable in areas where no previous human intrusions were found.

(5) The development of coal-fired power plants in San Juan County has led or may lead to environmental stresses and problems additional to those already discussed, and thus to added direct and indirect environmental costs. Many examples can be noted.

Energy-related growth in the Four Corners area results in increased demands for community facilities and services, increased needs for regional facilities and increased social disruption and stress.

Growth in the Kirtland-Fruitland area increases the amount of sewage which is disposed of by septic tanks in the San Juan Valley, where the water table is often near the surface. The likely contamination which results will intensify the need for proper sewage collection and treatment facilities.

The existing allocations of water for the Four Corners and San Juan plants account for a share of the costs associated with potential future water shortages in New Mexico. Such costs could include benefits lost if water supplies limit coal gasification, since gasification provides four times

as much labor income per unit water used as does electrical energy generation.

Erosion and blowing dust may result from land disruption at and near power plants, mines, transmission corridors and access roads.

Significant impacts on vegetation and wildlife will occur in the Farmington area as the result of population growth induced by energy development, resulting in the decline or elimination of game populations, such as antelope and deer.

It is possible that air pollution from power production could lead to weather modification in New Mexico, possibly including a reduction in precipitation and/or solar radiation.

Depletion or degradation of New Mexico's mineral, water, air, biological and other resources for electricity generation could conflict with long-term efficient use of these resources, since alternate methods may be more effective in producing energy, yet may cause less environmental impact.

The cumulative impacts of energy development in northwestern New Mexico may be greater in combination than the sum of the individual project impacts. Thus the effects of the two power plants in San Juan County could, through interaction with other projects, exceed those discussed here.

(6) The environmental impacts cited in the previous sections of this affidavit represent an environmental cost of electrical energy generation, a cost borne to a large degree by citizens of and visitors to New Mexico. Many of the benefits which might otherwise offset this cost, that is the economic and social benefits of energy use, occur in urban centers of Arizona, California, and Texas, far removed from the environmental stresses associated with energy production.

While no detailed benefit-cost analysis can be made regarding electricity generation in the Four Corners area, it is apparent that a regional imbalance occurs which favors consumers who are physically separated from the region in which environmental damage costs are concentrated. This imbalance appears inevitable if the state's resources are to be used to provide the energy supplies needed in other states.

To help redress the balance, those who consume New Mexico's coal must help bear the total production cost, including the indirect costs associated with environmental damage. One measure adopted by the state for recovering such costs is to obtain tax revenues on energy resources exported to other states. Such revenues represent the outcome of a logical policy designed to more equitably share the burdens of energy production. These revenues should help offset the environmental discrimination which is inherent in the export of energy.

/s/ CUBIA L. CLAYTON
Cubia L. Clayton

Subscribed and sworn to before me this 1st day of December, 1976.

/s/ RUTH A. BARRERAS
Notary Public

My Commission Expires 4-17-78.

Affidavit of Dan Croy, M.D.

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Dan Croy, M.D., being first duly sworn, upon his oath, deposes and says;

1. That he is the Secretary of the Department of Hospitals and Institutions, State of New Mexico, and a member of the Governor's Energy Impact Task Force and as such he is authorized to make this Affidavit, and that statements herein are made upon his personal information and belief.

2. The Department of Hospitals and Institutions is the designated Mental Health Authority for the State of New Mexico.

3. It is reported to me that rapid population growth resulting from energy development and industrialization in the Four Corners Area has been accompanied by an increase in social and mental health problems in San Juan County, New Mexico.

4. Also, I have been informed that other growth impacted communities have experienced similar problems;

that in Sweetwater County, Wyoming, an increase of 100% in the population of the County between 1960 and 1974 was accompanied by a 1000% increase in the number of alcoholism and mental health cases; that case incidence increased in the population already living in the County before the energy boom occurred; it was not confined to the new or transient employees and their families.

5. In opinion the reason this caseload increases in growth impacted areas is complex, but can be partially explained through a focus on the family and its relationship to the community in which the family resides. In a stable community, the family develops many social and recreational relationships, with many alternatives available which have been developed over the years to serve a relatively stable population. The family has help with child raising from youth organizations, and organized after-school or church activities. Wives can seek work if their household duties are not sufficiently challenging, or devote time as volunteers in a variety of public service projects, self-improvement activities, and the like.

6. Further explanations, in my opinion, are because it is reported that residents of communities undergoing rapid population growth frequently live in poorly planned trailer villages or in mobile homes located on the fringe or urban settlements; that there are few jobs for women in construction work, and service-related employment grows more slowly than employment in the energy and construction work sector; that development of social and recreational facilities, such as parks and recreation centers, lag far behind the population; that the mobile home family is a stranger to the community, and finds itself in a strange environment with few supports available; that the father may work overtime, increasing his absence from the home, and consequently, the wife finds herself under considerable stress, lonely and feeling both bored and burdened, her stress thus increasing the stresses experienced by the hus-

band and children; the result is often emotional crises and fights in the family, and/or family members seeking reduction of distress through alcohol and/or other drugs.

7. To continue; as stress in the home environment increases, it negatively affects the productivity of the father at work. As reported from Sweetwater County, when the prevalence of mental health and alcoholism problems in the County increased, industrial per worker productivity dropped by 20 to 40 per cent in the mines; employee turnover rose sharply, as did accident rates in the mines. Emotionally upset workers, preoccupied or worried over family problems, do not make efficient or safe workers.

8. The impact of rapid population growth on native residents of a community comes through the speeded-up pace of life, the experience of congestion and crowding, inflation in prices, and a general fear of change as the newcomers begin voting and running for office, often manifesting very foreign ideas about what should be done compared to the traditional political system's platform over the years prior to the boom. Change and a more frustrating environment produce stress, which can manifest itself in attempts to cope through drug and alcohol abuse, or through other mental health problem symptoms.

9. There have been successful approaches to dealing with these problems, but they have involved expenditure of funds. For example, in Gillette, Wyoming, it is reported that a \$1 million recreational/activity center was constructed to provide a variety of recreational, educational, and child-rearing services to both wives or offspring. In that center, and in Sweetwater County, emphasis has been placed on recruiting and training wives of construction and mining employees to work as volunteers in various human services programs, thus solving two problems at once for small cost (compared to hiring professional human services workers to deliver services). To use this technique, however, required that service programs exist and have

the facilities and staff to train, house, and supervise the volunteer workers; that telephone referral services and other forms of public information to be active; and that more intensive intervention services be available to those patients who need detoxification, medication, hospitalization, and other forms of care.

10. The San Juan County mental health center, San Juan County Mental Health Services, Inc. is currently operating at capacity, according to data furnished to me.

11. If per capita expenditures for mental health services in San Juan County were increased by 1169% to \$3.60 per capita, as the Department of Hospitals and Institutions will propose to the 1977 New Mexico Legislature, mental health service expenditures in San Juan County would reach only the 20th percentile for the average of such expenditures nationwide in 1974.

12. Thus there is a dire need for expansion of mental health services in the growth-impacted Four Corners area of New Mexico and the cost of providing these services adequately will place a significant burden upon the resources of the State.

/s/ DAN CROY
Dan Croy

SUBSCRIBED AND SWORN to before me this 29th day of November, 1976.

/s/ ILLEGIBLE

My commission expires: 5/7/78

Affidavit of Bruce R. Nicholson

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

AFFIDAVIT

BRUCE R. NICHOLSON, being duly sworn, upon oath, deposes and states as follows:

1. That he is over the age of 21 years and not a party to this action;
2. That he has a Bachelor of Science degree from Case Institute of Technology and a Master of Science degree from Purdue University, and has successfully completed two (2) courses offered by the United States Environmental Protection Agency dealing with air pollution meteorology and modeling techniques; and that he is a registered professional engineer in the State of New Mexico;
3. That he has been employed in various jobs both in industry and with the federal government; and he was employed for two (2) years in the Advanced Analysis Section in the Rocketdyne Division of Rockwell International;
4. That he is presently employed by the New Mexico Environmental Improvement Agency as Program Manager of the Meteorology Section and in that capacity is responsible for and performs modeling studies for permits, regulation development, variances, assurances and compliance schedules, and conducts visibility studies;
5. That he has researched the field in visibility and conducted field experimental visibility studies; and has contributed to the Southwest Energy Study subgroup on aesthetics in relation to visibility and presented a paper to the Air Pollution, Turbulence and Diffusion Symposium on visibility and has presented testimony as an expert witness

before the New Mexico Environmental Improvement Board on visibility effects;

6. That present emissions and future emissions from the Four Corners plant, San Juan power plant, and gasification facilities will have a significant impact upon visibility reduction both in the immediate region of the San Juan basin and also in distant, more populated areas outside of the Basin such as the Rio Grande Valley. This impact is currently the result of the Four Corners generating plant. This impact will be a decrease in visual range when viewing an area affected by the plume from the power plants; a decrease in the background visual range; and a decrease in the frequency of exceptional visual range; and an increase in the number of fine particulates in the air which produces a general widespread haze. That the estimates referenced are not conservative since the composition and size distribution were generally ignored. This means that future emission levels used in the references underpredict the adverse impact on visibility. That the qualitative effects of a reduction in visibility are to wash out colors; prevent the detection of terrain features; produce a general haze, and finally result in the terrain features looking gray. Finally, that NO_2 in sufficiently large concentrations or at low particulate concentrations, will produce a brownish color most commonly associated with urban smog.

7. The background visual range in and about New Mexico often exceeds 100 miles and has been observed to exceed 100 miles in the San Juan basin (Ref. Q & S). In the Santa Fe area during summer measurements, the visual range exceeded 100 miles and averaged 75 miles. (Ref. Q). Since this area has no major sources of particulate emissions and those that exist (travel on unpaved roads) are similar in most areas of the state, it can be concluded that background visual ranges in excess of 75 miles were common in the San

Juan basin prior to the introduction of power plants and that background visual ranges can still be considered to be near those values. It can also be concluded that the frequency of days with visual ranges greater than 100 miles was higher prior to the installation and operation of the Four Corners and San Juan power plants.

8. The qualitative effects of decreasing visual range are a loss of visual clarity; a decrease in color contrasts and discrimination; a mixing of white with the colors which reduces the colors finally to gray. As the visual range decreases, the ability to distinguish details of distant objects decreases (Ref. J). Four (4) color photographs in Ref. "J" attached to this affidavit show these aspects. It is immediately apparent that as the visibility decreases, more "air light" appears. This would commonly be identified as a haze. These four (4) photographs were reproduced from color slides.

9. Emission rates which are presently coming from the Four Corners plant and future emission rates (probably no sooner than 1980-1982) from Four Corners and the San Juan power plants are delineated in Ref. "K". Summarizing these, the present total potential emission rates from the Four Corners plant are 91.7 short tons per day for particulates; 323 tons per day for nitrogen oxides; and 378 tons per day for sulfur oxides. Future legal rates from Four Corners should be 12.8 tons per day of particulates; 182.7 tons per day of nitrogen oxides; 167 tons per day of sulfur oxides. This last figure for sulfur oxides is based upon a 60% removal and not a present legal limit, however, this is somewhat in question since a new regulation is being developed and the exact figure rate is unknown. For the San Juan plant (4 units) the emissions should be 10.3 tons per day of particulates; 102 tons per day of nitrogen oxides and 70 tons per day of sulfur oxides.

10. Several documents have defined the impact on visibility in the San Juan basin (Ref. A, B, F, M, N, Q & R).

Ref. "A" describes the visibility effects with future emission rates after 1977 when present regulations of New Mexico become effective. The emission rates used in the report are lower than presented in the revised report, Ref. "A". The results were endorsed by the power companies who were participants in the report. With future controls there are estimates of up to a totally opaque plume from the Four Corners; San Juan; and gasification facilities. The major contribution was from the Four Corners plant. Other situations produced a 10-50% reduction in visual range for well mixed plumes. Visual ranges down to 30 kilometers (18.7 miles) for the Four Corners plant, 74km (46 miles) for the San Juan plant, 40km (25 miles) for the Wesco gasification facility, and 126km (78.3 miles) for the El Paso gasification facility were determined at a 30km distance from each source. For the San Juan and Four Corners plants combined, the worst visual range was 22-34 km and Wesco and Burnham the visual range was 44-48km. None of these distances would allow their observer to look across San Juan Valley (approximately 61km). This report did not consider stagnation conditions and did not address the effects of NO_2 .

Ref. "F" is a report prepared for Arizona Public Service Company and is included as part of the transcript of a public hearing before the New Mexico Environmental Improvement Board, August 15, 1973. It shows that with present emission rates (the particulate rates used in this document are actually 73% of present levels) the visibility (defined as 62 miles) was reduced by 62% to 24 miles. With controls on fly ash at .02 pounds per million Btu's and with 70% SO_2 control of the visual range is reduced by 6-10%. However, the actual fly ash emissions as given in the New Mexico Air Quality Regulations is .05 lbs/million Btu's and SO_2 may be controlled to only 60%. This means a significantly greater reduction in visual range would occur. The report ignored the role of nitrates and NO_2 . The estimates given are strictly for ground level site and

not through the plume center line, which has higher particulate concentrations. This also means that stable atmosphere conditions will prove to be the worst case. Additionally, size distribution effects were ignored and the type of particulate were not distinguished when making the estimates. The conclusion is that the impacts will be significantly more severe than stated.

Ref. "M" presents the results of transition and stagnation conditions. The transition case shows that with present emission rates for fly ash and sulfur dioxide and a background visibility of 100 miles, than an observer located 40km down wind of the plant would notice the down wind visibility reduced to 10 miles and looking across the plume, the visibility would be 41 miles. For the stagnation model the 100 miles background visibility would be reduced to 25 miles. This appears to be a reasonable situation considering the results of measurements taken in the San Juan basin (Ref. R). These results are for the Four Corners plant only.

Ref. "N" presents the effects upon visibility for limited mixing conditions for the Four Corners power plant using present emission rates. The two cases show that visual range is reduced by 16 and 54%. These results did not include the affects of sulfates, nitrates or NO_2 which would decrease visual range more than given above.

Ref. "Q" describes measurements performed in various areas of New Mexico. The one test case in the San Juan area showed visual ranges of about 112 miles. This could be described as a background visual range during that test.

Ref. "R" describes visibility measurement tests conducted at the Bureau of Reclamation, Shiprock substation, looking across the river to the Hogback just west of the Four Corners plant. These results showed visual ranges of from 12 to 25 miles. The conditions surrounding the test were of clear skys and a noticeable haze. It was also noted that the winds were calm.

11. Various reports (Ref. E & L) describe the visibility impacts at points outside of the San Juan basin.

Ref. "E" presents results of visibility reductions at distance of 100km from the Four Corners power plant using our current New Mexico Air Quality Regulations, which are .05 lbs/million Btu's for fly ash; 1 lb/million Btu's for SO₂ and .7 lbs/million Btu's for NO_x. These rates are substantially lower than the present emission levels from the Four Corners power plant. At 100km, a 30% reduction in visual range was estimated. This report considered fly ash, sulfates and NO_x to contribute to the visibility reduction.

Ref. "L" describes possible visual ranges which could be observed in the Espanola Valley using present Four Corners emission rates and a background visibility of 100 miles. A reduction of approximately $\frac{1}{3}$ would be observed and the plume would be easily visible. This did not include the effects of sulfates or nitrates. If these were included it would probably prevent one from seeing across the Rio Grande Valley. As seen from Los Alamos there would be a thin gray layer at the very bottom of the valley from local sources followed by a relatively clean layer and then a hazy layer at about 7,000 feet (m.s.l.). This layer would be from 1500 to 3000 feet deep with clear air above it. Exactly this pattern has been observed on occasion in the valley. Data collected by scientists from Los Alamos indicated that significant impairment of visibility could be related to the Four Corners power plant.

12. Ref. "G" treats the general impacts of power plants on visibility. This paper indicates a significant effect on visibility from fly ash, NO_x, sulfates and nitrates. Table I of that report shows measured opacities in the range of from 20% to 90% with a fly ash emission rate of 7-8 tons/day. These opacities were observed at a distance of from 10-30km. Table IV presents the estimated visual ranges, which an observer located 52km from the plant would ex-

perience when fly ash and NO_x are present. The background visual range was 160km and an emission rate of 13 tons/day of fly ash. This table shows significant reductions of the visual range in the blue spectrum. This results in a plume which would have a brownish appearance.

13. Ref. "B" describes the role of particulate size upon visibility reduction. The report indicates that the impact of controls upon fly ash in relation to visibility is marginal since the controls will remove the larger particles, while being less effective in removing the fine particles, which are primarily responsible for the visibility reductions. This report shows significant visibility effects from fly ash, sulfates, nitrates and NO_x. It also documents the importance of particle size upon visibility. It shows that particles in the range of .4 up to 5 microns in diameter are most effective in reducing visibility. It shows the effects of NO_x in a plume in relation to visual range. Small concentrations can have a marked effect upon color transmission when fly ash levels are reduced.

14. Ref. "C", "D" & "I" deal with the relation between Air Quality Particulate Standards, ground level concentrations and visibility aesthetics. These show that the national primary and secondary Ambient Air Quality Standards, which were adopted in April, 1971, were based upon the Air Quality criteria documents. The particulate criteria document realized that a 150 microgram/cubic meter concentration would reduce the visual range to about 5 miles. Higher levels reduced this range to 3 miles and less. They consider this to be a hazard to airport operations. In New Mexico this is obviously not acceptable considering that natural visual ranges in excess of 100 miles are common. It can be deduced that the national primary and secondary levels for particulates bear no relation to New Mexico visibilities. In addition, pollution from sources such as power plants are released at elevated points from chimneys and the concentrations at ground level often have little relation to reductions in visual range. Plumes from industrial

sources are often observed to be 1000 feet or greater above ground. An observer looking at a distant terrain feature will often be looking up through the plume when viewing this feature. Thus, even though the plume does not touch the ground and ground level concentrations are quite low, there will be a visual range reduction and a noticeable plume.

/s/ BRUCE R. NICHOLSON, P.E.
Bruce R. Nicholson, P.E.

SUBSCRIBED AND SWORN to before me this 30th day of November, 1976.

/s/ DOLORES Y. DIGGINS
Notary Public

My Commission Expires: April 1, 1979

Affidavit of Stephen R. Flance

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Plaintiffs,*

vs.

FRED O'CHESKEY, ET AL., *Defendants.*

AFFIDAVIT OF STEPHEN R. FLANCE

Stephen R. Flance, being duly sworn, deposes and says:

1. I am owner and principal of Stephen R. Flance & Associates, a consulting firm located in Santa Fe, New Mexico. I have conducted studies whose purpose was predicting trends in social and economic development within municipal and county jurisdictions, and estimating the costs to the relevant governmental bodies of developing services responsive to these trends. My curriculum vitae is attached as Exhibit A hereto.

2. I have conducted a study, attached hereto as Exhibit B, to assess the current state of municipal and county services available in San Juan County where the Four Corners and San Juan generating plants are located, to predict population trends in the area, to identify that element of population growth related to the presence and growth of the two generating plants, and to estimate the capital needed by the various governmental entities to provide adequate services to the population generally and to the population related to the two generating plants. The study is based on review and evaluation of many studies concerning the economic development of the Four Corners area and the impact of the generating plants and statistics available from a variety of sources. The facts set out in the

affidavit and in Exhibit B are true to the best of my knowledge, and the opinions expressed by me reflect an accurate assessment of the available data.

3. My conclusions, which are based on information more fully set out and documented in Exhibit B, are as follows:

a. Population trends in San Juan County, resulting in part from the operation and expansion of the San Juan and Four Corners plants as well as the development of additional energy-related industries in the area, are such that the currently estimated population of 65,300 persons in the county may increase to as many as 138,000 persons by 1980.

b. In-migration to San Juan County attributable to the San Juan and Four Corners power plants, and their associated mining interests may range as high as 8,791 persons during the period 1976-1980.

c. Existing infrastructure and services provided by municipal and county government in the Four Corners region are currently utilized either at capacity or close to capacity. In the face of large population increases forecasted during the next five years, major expansion and improvement programs will be required for all affected jurisdictions.

d. The moderate projected population increase may create a demand for as much as \$147.6 million in capital outlays over the next 5 years; while under the high population projection as much as \$243.8 million may be required to meet this demand. In addition, between \$32,922,270 and \$38,934,630 may be required in state expenditures to upgrade roads in the region under proposed improvement projects. Furthermore, between \$24.4 million and \$40.3 million dollars per year may be required to meet the annual recurring costs of local government agencies expanded to accommodate increased populations; while annual costs to

the state are likely to range between \$14.3 million and \$23.7 million.

e. Capital outlays required to meet the demands of new populations attributable to the Four Corners and San Juan plants are estimated at between \$11.7 million and \$27.1 million at the present time.

f. The increase in population will create a demand for additional housing which may place a severe strain on the ability of the private sector to supply adequate financing or development. These shortages may inflate the costs of construction and may lead to primary reliance on mobile homes as the response to demand.

g. In developing additional governmental services to respond to an increasing population, the urgent need is for an infusion of "front-end money" to finance expansion before the need becomes critical. The electrical energy tax, with a legislated termination date in 1984, partially alleviates the burden of "front-end" costs impacting the state and communities in San Juan County.

/s/ STEPHEN R. FLANCE
Stephen R. Flance

Subscribed and sworn to before me this 2nd day of December, 1976.

/s/ (ILLEGIBLE)

Notary Public

My Commission Expires: November 13, 1978

Memorandum Opinion

The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico has been printed as Appendix A to the Jurisdictional Statement.

[1993]

Judgement

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue, BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

JUDGMENT

This matter having come on for hearing upon Plaintiffs' Motion for Summary Judgment and Plaintiffs' Supplemental Motion for Summary Judgment and upon Defendants' Motion for Summary Judgment and the Court having considered the pleadings, answers to interrogatories and affidavits and exhibits supporting such motions and the briefs and oral arguments of counsel and being otherwise fully advised in the premises.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the Electrical Energy Tax Act (Chapter 263, Laws 1975) does not violate any provision of the Constitution of the United States or of the Constitution of the State of New Mexico, including any amendments thereto; that the Electrical Energy Tax Act (Chapter 263, Laws 1975) does not violate Section 1322, Title II, Section 201(a) of the Tax Reform Act of 1976 enacted by the Congress of the United States; and that, the parties having stipulated that upon the pleadings, answers to interrogatories and affidavits and exhibits attached thereto that there is no genuine issue as to any material fact herein, plaintiffs' motion for summary judgment is granted.

ment and their supplemental motion for summary judgment be and the same hereby are denied and defendants' cross-motion for summary judgment be and the same hereby is granted.

/s/ EDWIN L. FELTER
Edwin L. Felter
District Judge

**Notice of Appeal
(To the Supreme Court of New Mexico)**

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO COUNTY OF SANTA FE

No. 50245

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs*,

vs.

FRED O'CHESKEY, Commissioner of Revenue,
BUREAU OF REVENUE, AND STATE OF NEW MEXICO, *Defendants*.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tucson Gas & Electric Company, plaintiffs above named, hereby appeal to the Supreme Court of New Mexico from the judgment entered in this action on the 18th day of February, 1977.

Dated this 18th day of March, 1977.

MONTGOMERY, FEDERICI, ANDREWS & HANNAHS
P. O. Box 2307
Santa Fe, New Mexico 87501

RODEY, DICKASON, SLOAN, AKIN AND ROBB
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Phoenix, Arizona 85073

BIGBEE, STEPHENSON, CARPENTER & CROUT
P. O. Box 669
Santa Fe, New Mexico 87501

/s/ By RICHARD N. CARPENTER, ESQ.
Richard N. Carpenter, Esq.

Attorneys for Plaintiffs

Opinion of Supreme Court of New Mexico

The Opinion of the Supreme Court of New Mexico has
been printed as Appendix B to the Jurisdictional State-
ment.

Notice of Appeal

The Notice of Appeal from the Supreme Court of New Mexico to the Supreme Court of the United States has been printed as Appendix C to the Jurisdictional Statement.